No. 90-68-CFH
Status: GRANTED

Title: Eddie S. Ylst, Warden, Petitioner
v.
Owen Duane Nunnemaker

Docketed:
July 9, 1990

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Niver,Ronald E.

Counsel for respondent: Drous,Juliana

Entry	Date	Note	Proceedings and Orders
1	Jul 9 1990	G	Petition for writ of certiorari filed.
2	Aug 8 1990		DISTRIBUTED. September 24, 1990
3	Aug 30 1990	P	Response requested -- BRW. (Due September 29, 1990)
4	Sep 28 1990		Brief of respondent Owen Duane Nunnemaker in opposition filed.
5	Sep 28 1990	G	Motion of respondent for leave to proceed in forma pauperis filed.
6	Oct 3 1990		REDISTRIBUTED. October 26, 1990
8	Oct 29 1990		REDISTRIBUTED. November 2, 1990
9	Nov 5 1990		Motion of respondent for leave to proceed in forma pauperis GRANTED.
10	Nov 5 1990		Petition GRANTED.
			**********
11	Nov 19 1990	G	Motion of respondent for appointment of counsel filed.
12	Nov 26 1990		DISTRIBUTED. November 30, 1990. (Motion for appointment of counsel).
14	Nov 27 1990		Brief amicus curiae of Wayne County, Michigan filed.
13	Dec 3 1990		Motion for appointment of counsel GRANTED and it is ordered that Juliana Drous, Esq., of San Francisco, California, is appointed to serve as counsel for the respondent in this case.
15	Dec 20 1990		Joint appendix filed.
16	Dec 20 1990		Brief of petitioner Eddie S. Ylst, Warden filed.
17	Dec 20 1990		Brief amici curiae of Arizona, et al. filed.
18	Dec 20 1990		Brief amicus curiae of Criminal Justice Legal Foundation filed.
19	Dec 26 1990		Lodging received.
20	Jan 23 1991		Brief of respondent Owen Duane Nunnemaker filed.
21	Feb 1 1991		SET FOR ARGUMENT TUESDAY, MARCH 19, 1991. (2ND CASE)
22	Feb 6 1991		CIRCULATED.
23	Feb 21 1991	X	Reply brief of petitioner Eddie S. Ylst, Warden filed.
24	Mar 18 1991		Lodging (Supreme Court of California Practices and Procedures) received and distributed.
25	Mar 19 1991		ARGUED.

(1)

90-68

COPY

No.

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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1989

EDDIE S. YLST, WARDEN

Petitioner,

v.

OWEN DUANE NUNNEMAKER

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether *Harris* v. *Reed*, ___ U.S. ___, 109 S.Ct. 1038 (1989), holds that a state high court's denial of habeas corpus relief, which is not a decision on the merits under state law, forgives a procedural default expressly claimed by an intermediate state appellate court on direct review.

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No.

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1989

EDDIE S. YLST, WARDEN,

Petitioner,

v.

OWEN DUANE NUNNEMAKER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed February 21, 1990 and amended May 25, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was reported at 896 F.2d 1200 (1990), and was amended upon the denial of rehearing. ___ F.2d ___. A copy of the amended opinion is attached to this petition as Appendix A. The order of the District Court denying the petition for writ of habeas corpus was unreported. A copy of that order appears as Appendix B.

The opinion of the California Court of Appeal, First Appellate District, was unreported and appears as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 21, 1990. Rehearing was denied on May 25, 1990. This petition for writ of certiorari followed within 90 days. 28 U.S.C. § 2101(c); Supreme Court Rule 13.1, 13.4. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 28, section 2254 provides in pertinent part:

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering

such process ineffective to protect the rights of the prisoner."

STATEMENT OF THE CASE

A. State Proceedings.

By an information filed in Sonoma County Superior Court on August 21, 1975, respondent Owen Duane Nunnemaker was charged with murder and assault with a deadly weapon, in violation of California Penal Code sections 187 and 245(a). It was further alleged that during the commission of both offenses, respondent was armed with, and did use, a firearm, in violation of California Penal Code sections 12022 and 12022.5. On January 30, 1976, the jury found respondent guilty of murder in the first degree, and further found that he was armed with, and did use, a deadly weapon during the commission of this offense. Respondent was sentenced to life imprisonment.

On June 30, 1978, the California Court of Appeal for the First Appellate District modified and affirmed the judgment of conviction. On September 27, 1978, the California Supreme Court denied respondent's petition for hearing.

In 1985 and 1986, respondent filed petitions for writs of habeas corpus in, respectively and successively, the Sonoma County Superior Court, the Court of Appeal, and the California Supreme Court. The petitions were summarily denied. Copies of the supreme court's orders denying relief appear as Appendices D and E, respectively.

B. Federal Proceedings.

On November 12, 1987, respondent filed a petition for writ of habeas corpus in the United States District Court for the Northern District of California. The district

court issued an order to show cause on July 8, 1988, and denied the petition on December 9, 1988.

Upon respondent's appeal to the Court of Appeals for the Ninth Circuit, the court, on February 21, 1990, affirmed in part and reversed in part the judgment of the district court, with directions to consider the merits of respondent's federal claim. On May 25, 1990, the court of appeals denied rehearing and amended its opinion.

C. **Statement of the Facts**.

The opinion of the California Court of Appeal provides a summary of the events which led to respondent's conviction for the murder of his wife:

"In the afternoon of May 31, 1975 [respondent Owen Duane Nunnemaker] - armed with an automatic weapon - forcibly entered the home of his estranged wife, Alice, and following a struggle fired a single shot from a distance

of three feet mortally wounding the victim. As witnesses to the shooting attempted to assist the fallen victim, the [respondent] restrained them from summoning aid and cut the telephone cord preventing its use to call an ambulance. One of the foster children, Linda (age 16 years), managed to exit the home and called the sheriff's office on a neighbor's telephone. When the officers arrived, Linda informed them of the shooting. After all but one of the children had exited, the officers entered the home and observed the victim lying on the floor of the living room and another foster child, Sherry (age 17 years), at her side. During the search, they discovered the [respondent] in a rear bedroom where apparently he had just telephoned the sheriff's office requesting an ambulance. [Respondent] offered no resistance and was placed under arrest and searched; several rounds of nine

(9) millimeter ammunition were found in [his] pocket; [respondent] led the officers to his car parked in front of the house where they observed the weapon used lying on the front seat.

"At trial, Linda, Sherry and Mrs. Brower testified that the [respondent] appeared sober and calm immediately after the shooting; the three arresting officers gave similar testimony concerning their observations of [respondent] at the time of his arrest.

"The [respondent] testified that he went to the home for the purpose of delivering a birthday present and to visit his children, which permission was refused by the victim. That as he and the victim were standing at the door, the victim suddenly 'launched herself toward me.' Thereafter, he could not recall any of the ensuing events until he walked to his car with his son Shawn and gave

him the birthday present; he then noticed he was holding a gun in his hand which he placed in his car. Upon reentering the house, and thereafter seeing his wife lying on the floor, he telephoned the sheriff's office from the rear bedroom. [Respondent] denied that he had intentionally shot his wife whom he loved deeply.

"The defense introduced psychiatric testimony in support of a diminished capacity defense; on rebuttal, the prosecution presented conflicting psychiatric testimony." (Appendix C, pp. 2-4; fns. omitted.)

REASONS FOR GRANTING THE WRIT

Relying upon an inapplicable dictum in *Harris v. Reed*, 109 S.Ct. 1038, 1044-1045, n.12 (1989), and misapprehending state law, the Ninth Circuit's opinion in this case has furnished state prisoners with a blueprint for circumventing state procedural rules and forum shopping

on federal issues. The Ninth Circuit's opinion permits a state prisoner whose procedural default has foreclosed state appellate redress to seek federal review of his claims by the simple expedient of first seeking state habeas corpus relief, which predictably would be denied without comment. In this manner a state prisoner in California could choose his forum, a choice which the Federal Habeas Corpus Act was intended to foreclose.

This case presents a stark example of a prisoner who, procedurally foreclosed from litigating a federal claim in state court, has been permitted to raise his claim in a federal forum without showing the cause and prejudice required by *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). Respondent Nunnemaker challenged his murder conviction in the California Court of Appeal on the ground that his statement to a prosecution psychiatrist was elicited in

violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The court of appeal refused to address this claim in obedience to the legislative prohibition against considering evidentiary claims not raised at trial. The California Supreme Court denied a petition for hearing.

Almost a decade later, respondent again challenged the admissibility of the statement, this time by way of state habeas corpus. The supreme court twice denied habeas petitions on this ground, the second time without comment or citation to authority. The Ninth Circuit held that the second denial was a rejection of the merits of respondent's *Miranda* claim and that it served to forgive a procedural default which the court of appeal had expressly invoked ten years earlier.

The Ninth Circuit's opinion was founded not upon logic or precedent but upon its ignorance of state law. It

is a time-honored principle of California habeas corpus procedure that a denial without comment or case citation of habeas relief by a court which otherwise has jurisdiction is not a decision on the merits. When a petition for writ of habeas corpus is presented to the seven Justices of the California Supreme Court, each may have a separate reason for declining to issue the writ. When the supreme court denies habeas relief in the exercise of its original jurisdiction, it is not a determination of the merits of the petitioner's allegations.

Relying upon dictum in *Harris* v. *Reed*, 109 S.Ct. at 1038, 1044-1045 n. 12, the Ninth Circuit suggested that a California court could avoid the presumption that its denial of habeas relief reflected a decision on the merits by an express statement that "relief is denied for reasons of procedural default." The court's suggestion is based

upon one of two premises. The first is that a denial of habeas relief without comment or case citation is a resolution of the merits. As we have already stated, this premise is simply incorrect as a matter of state law. The alternative premise is that the Federal Habeas Corpus Act requires such a presumption. Nothing in *Harris*, or in any other decision of this Court, requires such a sweeping change in Federal Habeas Corpus procedure.

Harris made clear that a procedural default in state court bars federal habeas consideration of a federal claim if "the last state court rendering a judgment in the case ""clearly and expressly"" states that its judgment rests on a state procedural bar." 109 S.Ct. at 1043. The *only* state *judgment* in this case -- the opinion of the court of appeal which affirmed respondent's conviction on direct review -- expressly and exclusively rested its rejection of

respondent's *Miranda* claim upon his failure to raise the issue at trial.

Under the Ninth Circuit's opinion, a state prisoner who has failed, either inadvertently or intentionally, to raise an issue at trial or on direct appeal no longer need fear the forbidding test of cause and prejudice erected by *Wainwright* v. *Sykes*. To open the doors of federal court, he need only file a petition for writ of habeas corpus in the state supreme court. If that court denies relief without comment, as the California Supreme Court does hundreds of times each year, that denial will serve both to exhaust state remedies and to forgive the procedural default. To avoid such cynical manipulation of the post-conviction remedies provided by the state and federal systems, the state supreme court must alter its procedures drastically, providing an explanation for the denial of

relief. That would place an intolerable strain upon the resources of this state's highest court.

It is no exaggeration to state that the lower court's opinion, if allowed to stand, will serve to eviscerate the salutary rule of *Wainwright* v. *Sykes* in this and all other states which permit their supreme courts to manage their dockets by summarily denying habeas corpus relief. Such a result was neither dictated nor authorized by *Harris*, is in conflict with other Circuits, and is unnecessary to provide access to federal courts prisoners who have in good faith attempted to comply with state procedural rules. In view of the national importance of this issue, we believe that the need for review by this Court is manifest.

ARGUMENT

I.

THE SUMMARY DENIAL OF HABEAS CORPUS BY THE CALIFORNIA SUPREME COURT WAS NOT A DECISION ON THE MERITS WHICH FORGAVE THE PROCEDURAL BAR UPON WHICH THE COURT OF APPEAL RELIED WHEN IT REFUSED TO CONSIDER RESPONDENT'S FEDERAL CLAIM.

Convicted in 1977 of the murder of his wife, respondent Nunnemaker appealed to the California Court of Appeal, asserting, *inter alia*, that he was not advised of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), before he was interviewed by a prosecution psychiatrist who later testified at his trial. Obedient to state procedural law (Cal. Evid. Code, § 353; *In re Dennis M.*, 70 Cal.2d 444, 461-462, 75 Cal.Rptr. 1 [1969]), the state appellate court held that "the failure to interpose an

objection during trial precludes our consideration on appeal." App. C at p. 11. The California Supreme Court denied his petition for hearing. Respondent then attempted to litigate his *Miranda* issue by way of state habeas corpus, filing petitions in the Sonoma County Superior Court, in the California Court of Appeal for the First District, and twice in the California Supreme Court. All petitions were denied without reference to the merits of the claim.

Respondent filed a petition for writ of habeas corpus in the federal district court, which found that respondent's procedural default in state court precluded federal review of his *Miranda* and (newly raised) Sixth Amendment claims. On appeal, the Court of Appeals for the Ninth Circuit reversed in part, holding that under this Court's decision in *Harris* v. *Reed*, the denial of habeas corpus

relief by the California Supreme Court, without comment or case citation, was a resolution of the merits of respondent's contention, which resolution forgave the procedural default invoked by the court of appeal a decade earlier. If the California Supreme Court intended to rely upon that procedural bar, the Ninth Circuit ruled, it could have and should have said so.

The flaw in this opinion is as easily identifiable as its consequences are grave. The Ninth Circuit has misapprehended California law, which holds that a summary denial of habeas corpus relief without comment or case citation is not a resolution of the question presented by petitioner. The Ninth Circuit's decision furnishes state prisoners with a blueprint for circumventing California's appeal procedure on federal questions. In short, the decision alters the balance carefully formulated

by this Court in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), and its progeny.

A. A Denial of Habeas Corpus Relief by a State Court Without Opinion or Case Citation is Not a Denial on The Merits.

We begin by outlining California habeas corpus procedure. The writ of habeas corpus is guaranteed by the California Constitution (Art. I, § 11) and statute (Cal. Pen. Code, §§ 1473 *et seq.*). Although the supreme court and courts of appeal have original jurisdiction in habeas corpus proceedings (Cal.Const., Art. VI, § 10), a prisoner seeking such collateral review is expected to file his petition first in superior court, the court of general jurisdiction which has the power to hear evidence and resolve factual disputes. *See e.g., In re Hillery*, 202 Cal.App.2d 293, 20 Cal.Rptr. 759 (1962). The petition is an application for a writ of habeas corpus; it must allege

the reason why the petitioner's imprisonment is illegal. Cal. Pen. Code § 1474; *People* v. *Pacini*, 120 Cal.App.3d 877, 883-884, 174 Cal.Rptr. 820 (1981). If the petition does not state facts which, if true, would entitle the petitioner to relief, the court must deny the petition. *Griggs* v. *Superior Court*, 16 Cal.3d 341, 347, 128 Cal.Rptr. 223 (1976); *In re Swain*, 34 Cal.2d 300, 304, 209 P.2d 793 (1949). If the petition does state a prima facie case for relief, the court then issues an order to show cause. *See In re Lewallen*, 23 Cal.3d 274, 278 n.2, 152 Cal.Rptr. 528 (1979); *In re Hochberg*, 2 Cal.3d 870, 873 n. 2, 87 Cal.Rptr. 681 (1970). The order to show cause directs the custodian to serve and file a written return, which must "plainly and unequivocally" "state the authority and cause of such imprisonment or restraint." Cal. Pen. Code § 1480. The return, which must be "responsive to the

grounds actually presented in the petition" (*People* v. *Green*, 27 Cal.3d 1, 43 n. 28, 164 Cal.Rptr. 1 [1980]), "functions analogously to a "'complaint in a civil proceeding"' in asserting grounds of legality and 'as to any factual allegations it makes."' *People* v. *Pacini*, 120 Cal.App.3d at 884, 174 Cal.Rptr. at 826. The petitioner then responds by filing a traverse in which he "may deny or controvert any of the material facts or matters set forth in the return. . . ." Cal. Pen. Code § 1484; *In re Saunders*, 2 Cal.3d 1033, 1047, 88 Cal.Rptr. 633 (1970). "The traverse, and the petition whereby stipulation or acquiescence it is treated as a traverse . . . are analogous to the answer in a civil proceeding. . . ." *Ibid.* "The issues are joined in this manner, and 'new matter set up in the petition [and traverse] which tends to invalidate the apparent effect of the process set forth in the return is

deemed denied and must be proved by the party alleging it, namely the petitioner.'" *Id.* at 1047-1048, 88 Cal.Rptr. 633.

If the petitioner "except[s] to the sufficiency" (Cal. Pen. Code, § 1484) of the return in his traverse, he has in effect raised questions of law by a procedure analogous to demurrer. By the same token, if the return acknowledges the allegations in the petition and traverse, relief may be granted without a hearing if those allegations justify such action. *In re Saunders*, 2 Cal.3d at 1048, 88 Cal.Rptr. 633; *In re Masching*, 41 Cal.2d 530, 533, 261 P.2d 251 (1953). If the issue is not the legal significance of undisputed allegations, but the existence of disputed facts, the superior court may compel the attendance of witnesses and to "do and perform all other facts and things

necessary to a full and fair hearing and determination of the case." Cal. Pen. Code § 1484.

If the superior court denies relief, the petitioner has no right to appeal the denial. He must file a new petition in either the court of appeal or the supreme court. *Gardner* v. *California*, 393 U.S. 367, 368 (1969); *In re Crow*, 4 Cal.3d 613, 621 n. 8, 94 Cal.Rptr. 254 (1971). With one exception, the rules of pleading and proof delineated above are generally applicable to appellate courts. The supreme court and courts of appeal have no power to find facts. If a petition and return generate a factual conflict, the appellate court will appoint a referee to hold a hearing and make findings and conclusions. *In re Egan*, 24 Cal.2d 323, 327, 149 P.2d 693 (1944). Alternatively, when the court of appeal issues an order to show cause, it may make it returnable before the superior

court, which will hold the hearing. *In re Hochberg, supra*, 2 Cal.3d at 873-874 n. 2, 87 Cal.Rptr. 681.

Should the court of appeal deny the writ of habeas corpus, the prisoner has two possible remedies. They theoretically are mutually exclusive and their existence depends upon the reason for the denial. If the court of appeal denies relief without opinion, the prisoner simply petitions for habeas corpus in the supreme court. Cal.Pen. Code § 1475; *In re Crow*, 4 Cal.3d at 621 n. 8, 94 Cal.Rptr. 254. If, however, the court writes an opinion which denies relief, an action necessitated by the issuance of an order to show cause and the filing of a return (*In re Mazoros*, 76 Cal.App.3d 50, 52-53, 142 Cal.Rptr. 609 (1977)), the prisoner should file a petition for review in the state supreme court. Cal. Pen. Code § 1506; Cal.

Rules of Court, rule 28; *In re Michael E.*, 15 Cal.3d 183, 193 n. 15, 123 Cal.Rptr. 103 (1975).

Habeas corpus generally will not lie to consider issues which were raised, or could have been raised, on direct review (*In re Terry*, 4 Cal.3d 911, 927, 95 Cal.Rptr. 31 (1971); *In re Waltreus*, 62 Cal.2d 218, 225, 42 Cal.Rptr. 9 (1965)), unless newly discovered facts or a change in the law merit reconsideration of the claim. *In re Bevill*, 68 Cal.2d 854, 863 n. 9, 69 Cal.Rptr. 599 (1968). Similarly, a contention which has been raised and rejected in a prior application for habeas corpus will not be reconsidered. *In re Lynch*, 8 Cal.3d 410, 439 n. 26, 105 Cal.Rptr. 217 (1972); *In re Miller*, 17 Cal.2d 734, 735, 112 P.2d 10 (1941).

Finally, and most importantly, we explain the consequences of a summary denial of a writ of habeas

corpus such as that issued by the California Supreme Court upon respondent's second application for habeas relief. The California Constitution requires that "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." Cal.Const., Art. VI, § 14. Because a summary denial is without opinion, it cannot be a determination of a "cause" within the meaning of the state constitution. *See People* v. *Medina*, 6 Cal.3d 484, 490, 99 Cal.Rptr. 630 (1972); *Myers* v. *Ylst*, 897 F.2d 417, 426-428 (9th Cir. 1990) (diss.opn.). For this reason a summary denial of a habeas petition does not establish the law of the case. *People* v. *Pacini*, 120 Cal.App.3d at 884, 174 Cal.Rptr. at 826. It is not a judgment which conclusively and definitively establishes the rights and obligations of the parties. To give such preclusive effect to a summary

denial would violate the California Constitution. The Ninth Circuit's opinion has, in effect, accused the California Supreme Court of habitually violating its own charter.

B. The Denial by The California Supreme Court of Respondent's Habeas Corpus Petition Was Not a Resolution of His Federal Claim; *Harris* v. *Reed* Does Not Require a Contrary Rule.

(1)

The foregoing principles, to which the Court of Appeals for the Ninth Circuit made no reference, explain the denials of habeas corpus by the California Supreme Court. Most of the contentions made by respondent in his petition for writ of habeas corpus had been raised in his direct review. Habeas corpus will not lie to relitigate claims that were raised, or could have been raised, on appeal. *In re Waltreus, supra,* which the supreme court cited in its first minute order (App. D), stands for this

proposition. In his habeas petition, respondent also challenged the admissibility of the testimony of "emotionally disturbed children," (*see* App. B at 7), a claim which was not raised on appeal. The supreme court then addressed that contention with its citation of *In re Swain, supra*, which holds that "vague, conclusionary allegations . . . are insufficient to warrant issuance of the writ," but its denial "is not a ruling on the merits. . . ." 34 Cal.2d at 303-304, 209 P.2d at 793. Thus, relief could not be granted unless petitioner explained his contention with sufficient particularity and, in addition, disclosed the reasons for delaying in the presentation of those facts. This denial did not forgive the procedural bar invoked by the state court of appeal eight years earlier when it declined to consider respondent's *Miranda* claim.

After the district court, understandably uncertain whether respondent had exhausted his state remedies, dismissed his first petition for federal habeas corpus for failure to show exhaustion, respondent returned to state court, filing a second petition for habeas corpus in the state supreme court. That court denied relief without comment or case citation. That order is the source of the controversy between the parties. Based upon the rules of practice governing state habeas corpus procedure, we may confidently state that the supreme court denied respondent's second petition because it had denied the first petition and respondent had alleged no new facts which would have required the court to reconsider his claims. The Ninth Circuit's failure to grasp this elementary principle of state habeas corpus procedure

constituted plain error; that is not why we seek review by this Court, however.

A federal court reviewing a California conviction is not required to decipher summary denials of habeas corpus in order to determine their legal basis. Rather, it need only remember one overarching principle: A summary denial of habeas corpus, even with a case citation, is not a "judgment" which in any way replaces or supplants an opinion of an appellate court affirming a criminal conviction. The last state court rendering a judgment in this case was the court of appeal which refused to consider respondent's *Miranda* claim by reason of his procedural default at trial. A subsequent summary denial of habeas relief by a California state court is not a judgment which forgives the procedural bar. The Ninth Circuit's disregard of the well-established principle

potentially sets at large every conviction affirmed by an appellate court which had invoked a procedural bar in declining to consider a federal claim. That is why we seek certiorari.

We reiterate that the Ninth Circuit's opinion does violence to state law. A carefully reasoned opinion of the California Supreme Court which invokes a procedural default on direct review would be supplanted by a casual minute order of a superior court denying relief without comment. If the court of appeal and supreme court also summarily deny relief, a procedural bar miraculously is transformed into a decision on the merits. *But cf. Russell* v. *Lynaugh*, 892 F.2d 1205 (5th Cir. 1989). Indeed, even if the superior court denies relief in a written opinion which invoked a procedural bar, a one-line denial by the state court of appeal and supreme court will also produce

this transformation. *But cf. Harmon* v. *Barton*, 894 F.2d 1208 (11th Cir. 1990); *Arce* v. *Smith*, 889 F.2d 1271 (2d Cir. 1989).

(2)

But, the Ninth Circuit explains, *Harris* v. *Reed, supra*, compels this result. As the Ninth Circuit views the matter, a denial of habeas relief without comment or case citation is conclusively presumed to be a judgment on the merits, forgiving any procedural default upon which state courts had previously relied in denying relief. The Ninth Circuit's view of *Harris* is unsupported by the holding or reasoning of that decision.

In *Harris,* the prisoner filed a petition for post-conviction relief in Illinois courts, raising a contention which he had not asserted on direct appeal. The Circuit and Appellate Courts denied relief, the latter court

ambiguously noting a procedural default but also addressing the merits of the contention in the course of a seven-page opinion. This Court held that the federal claim could be raised on federal habeas corpus in the absence of a "plain statement" that the state courts relied upon the procedural bar as an independent basis for its disposition of the case. This court stated: "[A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "'clearly and expressly'" states that its judgment rests on a state procedural bar." 109 S.Ct. at 1043.

This case is markedly different from *Harris* because respondent did raise the *Miranda* claim on direct appeal. The court of appeal expressly and exclusively rested its disposition of the claim upon respondent's failure to

object at trial. Thus, the "last state court rendering a judgment" based its decision exclusively on procedural grounds.

The Ninth Circuit's insistence that the California Supreme Court was the last state court to render judgment is based upon this Court's dictum, responding to Justice Kennedy's well-founded concerns (*Id.* at 1050 n.1), that "a state court that wishes to rely on a procedural bar rule in a one-line *pro forma* order easily can write that 'relief is denied for reasons of procedural default.'" *Id.* at 1044-1045 n. 12. Such a rule may be necessary in, and should be confined to, cases in which the federal claim is raised for the first time on state habeas corpus. Were the rule otherwise, a federal habeas court would be left

without a clue why relief was denied.[1/] But when, as here, an opinion expressly relies upon a procedural default to deny relief, it is senseless to presume that a summary denial forgave a procedural default. Then, Justice Kennedy's prediction will surely come to pass: "[P]risoners whose claims otherwise would be procedurally barred now have every incentive to burden state courts with a never-ending stream of petitions for post-conviction

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1. The Ninth Circuit's presumption that an unexplained denial by a state court of habeas relief finds its genesis in *Harris* v. *Superior Court*, 500 F.2d 1124 (9th Cir. 1974), which held that the California Supreme Court's summary denial of a state habeas petition is a decision on the merits for purposes of *exhaustion*. Such a rule is a necessary fiction created to avoid a waste of the prisoner's time in attempting to comply with the exhaustion requirement. *See Thompson* v. *Procunier*, 539 F.2d 26, 28 (9th Cir. 1976). This presumption may also be necessary in the procedural default context but only when *no* state court has written an opinion explaining to the petitioner why it was denying his petition. That is the apparent basis for *Harris* v. *Reed*. But when, as here, an opinion of a state court clearly explains the procedural basis for the rejection of the federal claim, this amiable fiction is, at best, unnecessary and, at worst, pernicious.

relief. Such perseverance may, in due course, be rewarded with a suitably ambiguous rebuff, perhaps a one-line order finding that a prisoner's claim 'lacks merit' or stating that relief is 'denied.'" *Id.* at 1054. In the context of a case such as this one, the crowning irony is that the "ambiguous rebuff" will serve to forgive a procedural bar upon which the appellate court had based its opinion. It is no exaggeration to say that the Ninth Circuit's opinion makes state procedural rules unenforceable.

Nor can all of the foregoing be avoided as easily as the Ninth Circuit apparently believes. An order by the state supreme court denying relief "for reasons of procedural default" would solve the problem, but that is easier said than done. As we explained, California Supreme Court habeas corpus jurisdiction has always been

wholly discretionary.[2/] Each Justice may have his or her own reasons for denial: a lack of merit, a failure to exhaust, a failure to object at trial, a failure to object on appeal, a failure to plead with sufficient particularity. In addition, many, if not most, habeas petitions contain more than one claim, each of which may be denied for different reasons by each Justice. The inescapable result -- one surely not intended by this Court -- would be to require the California Supreme Court to decide each claim in each habeas petition on a ground upon which a majority of the Justices concur. The supreme court cannot

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2. Supreme Court of California, Practices and Procedure (1990 Rev.) at 12, 13.

increase its workload by 800 cases[3/] to vindicate the Ninth Circuit's untenable concept of procedural default.

Reflection upon this problem discloses an additional complication. If three Justices deny habeas relief on procedural grounds and one Justice votes to deny solely for failure to state a prima facie case for relief, the Ninth Circuit's opinion provides absolutely no guidance to decide whether the denial was for substantive or procedural reasons. Reference to the last state court opinion will avoid this needless difficulty.

In this case, the only state court opinion invoked, rather than forgave, respondent's procedural default. It is unnecessary to look beyond that opinion for the reason why state courts have rejected his federal claim.

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3. In fiscal year 1988-89, 837 original petitions for writ of habeas corpus were filed in the California Supreme Court. 2 Judicial Council of California, 1990 Annual Report, at 24.

Respondent should be barred from federal habeas corpus relief.

C. The Ninth Circuit's Opinion is in Conflict With Other Cases Construing *Harris* v. *Reed*.

The opinion of the Ninth Circuit is at odds with the decisions of other Circuits, which instead support our view of *Harris*. Those courts hold that a procedural default by a state prisoner is presumed forgiven unless a state court, at some stage of the proceedings in the state review of the conviction, expressly relies upon the default to deny relief. Silence by the state courts will not satisfy *Harris*. *See e.g., Durosko* v. *Lewis*, 882 F.2d 357 (9th Cir. 1989); *Edwards* v. *Butler*, 882 F.2d 160 (5th Cir. 1989); *Booker* v. *Lynaugh*, 872 F.2d 100 (5th Cir. 1989). However, when a state court writes an opinion which expressly denies relief for failing to comply with state procedure, subsequent summary denials of relief will not transform the

procedural bar into a rejection of the merits of the federal claim. *See e.g., Harmon* v. *Barton*, 894 F.2d 1268 (11th Cir. 1990); *Russell* v. *Lynaugh*, 892 F.2d 1205 (5th Cir. 1989); *Arce* v. *Smith*, 889 F.2d 1271 (2d Cir. 1989); *Ellis* v. *Lynaugh*, 873 F.2d 830 (5th Cir. 1989).

Russell v. *Lynaugh* is squarely contrary to the present case in both reasoning and result. There the prisoner had claimed on direct appeal in the Texas Court of Criminal Appeals that three potential jurors were improperly excluded. The state court rejected the contention on the ground that the prisoner had made no objection at trial. 892 F.2d at 1209. He then petitioned for state habeas corpus, contending that a potential fourth juror had been improperly removed. The trial court denied relief, citing the opinion of the court of appeals, and that court also denied habeas corpus in an unwritten order. *Ibid.*

The Fifth Circuit found that the state court disposition satisfied the *Harris* "plain statement" rule. It held that the opinion of the Texas Court of Appeals was the expression of "the last court rendering judgment," and decisively rejected the argument that the later unwritten order of that court was the last judgment. "We think that this overly technical argument fails to detract from the unambiguous expression of the Texas Court of Criminal Appeals. On each occasion that the dismissal of a *Witherspoon* juror was raised, the procedural bar was, in fact, applied on the grounds precisely present in the [fourth juror] claim: no objection to the venireperson had been raised at trial." *Id.* at 1210. "Nor is the simple denial of the petitioner's rerun of the identical claims on habeas any basis to ignore the clear and express rulings of the Texas appellate court. Indeed, we unhesitatingly read

this disposition of the habeas claims as a clear and express reliance upon the earlier, fully articulated rulings applying the procedural bar. . . . The 'plain statement' rule does not require that the state court regurgitate the words of its earlier clear and express rulings every time identified issues are resubmitted to that court in the same case." *Id.* at 1210-1211.

Russell stands for the unassailable proposition that a procedural bar erected by an appellate court on direct review does not fall under compulsion of *Harris* when habeas relief is subsequently denied without comment. A federal habeas court confronted with such unexplained denials need not examine state law or study the record to determine whether a procedural default was the reason for the denial of the federal claim. Reference to the last state court opinion containing a "plain statement"

"achieves the important objective of permitting the federal court rapidly to identify whether federal issues are properly presented before it." *Harris* v. *Reed*, 109 S.Ct. at 1044; *Russell* v. *Lynaugh*, 892 F.2d at 1211.

In attempting to harmonize its holding with two other irreconcilable cases -- *McQuown* v. *McCartney*, 795 F.2d 807 (9th Cir. 1986), and *Ellis* v. *Lynaugh, supra* -- the Ninth Circuit purported to discern a distinction between an appellate affirmance of a trial court denial of habeas corpus, which the court said is not a decision on the merits, and a summary denial of an original habeas petition, which the court declared is a resolution of the federal claim. App. A at 5368 n. 4, 5369 n. 5. Such a gossamer distinction is neither required by *Harris* nor faithful to the concept of state-federal comity which section 2254 is intended to vindicate. *Harris* requires only

that the last opinion of the state courts contain a plain statement that a procedural bar was invoked to deny relief. The record in this case contains such an opinion.

More fundamentally, the opinion in this case will arrogate to the Ninth Circuit the power to "micromanage" the docket of the California Supreme Court. *Cf. Myers* v. *Ylst*, 897 F.2d at 426 (dis. opn.). It will permit the Ninth Circuit to ignore clearly worded appellate opinions and instead examine the summary dispositions of the supreme court for the purpose of deriving their meaning. If the order in question denies review, the Ninth Circuit will ascribe no significance to it, presumably even if the state court cites a case which indicates a rejection of the merits of the petitioner's claim. However, if the order denies habeas relief, it becomes potentially significant, and citations to cases will require deciphering. In short, this

opinion commissions federal district courts as cryptographers of state summary orders which deny post-conviction relief. It is difficult to imagine a more intrusive inquiry into state procedures, one that is not authorized by *Harris*, not desirable in terms of comity concerns, and clearly not necessary.

Furthermore, the distinction created by the Ninth Circuit between denial of habeas relief and denial of review is wholly illusory, as the court itself cryptically acknowledged by reserving this issue for another day. App. A at 1842-1843 n.4. Until that time, a prisoner determines the nature of the disposition which he receives from the California Supreme Court by his denomination of the pleading. If he is wily enough to call it a petition for writ of habeas corpus, he has assured his access to

federal court. It is irrational to confer such power upon a litigant.

The state court of appeal invoked a procedural bar against respondent's *Miranda* claim in 1978. Under state law and *Harris* v. *Reed*, only a subsequent opinion, not a silent order, can forgive that default. To the extent that it holds otherwise, the Ninth Circuit's opinion must be reversed.

CONCLUSION

For the foregoing reasons, we respectfully ask that the Petition for Writ of Certiorari to the Court of Appeals for the Ninth Court be granted.

DATED: July 5, 1990

JOHN K. VAN DE KAMP,
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APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Owen Duane Nunnemaker, Petitioner-Appellant, v. Eddie S. Ylst Respondent-Appellee.	No. 89-15050 D.C. No. CV 88-1828 TEH ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Submitted November 17, 1989*/
San Francisco, California

Filed February 21, 1990
Amended May 25, 1990

Before: Jerome Farris, Harry Pregerson and
Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Pregerson

SUMMARY

HABEAS CORPUS

Affirming in part and reversing in part a judgment of the district court, the court held that a state procedural default bars federal habeas corpus review only if the last

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*. The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

state court clearly and expressly states that its judgment rests on a state procedural bar.

Petitioner California State prisoner Owen Nunnemaker appealed the district court's dismissal of his petition for habeas corpus filed under 28 U.S.C. § 2254. A jury convicted Nunnemaker of first degree murder. At trial, defense counsel made specific objections to certain statements made by the state's psychiatrist, but failed to challenge the entire testimony on the grounds that it was based on an interview conducted in violation of Nunnemaker's Fifth and Sixth Amendment rights. On direct appeal, Nunnemaker raised these federal constitutional challenges for the first time. Affirming the conviction, the state appellate court expressly avoided these challenges and held that failure to interpose an objection during trial precluded consideration on review. The California Supreme Court denied Nunnemaker's petition for hearing without comment or case citation. After Nunnemaker's habeas corpus petitions were denied by the state courts, the district court also denied his habeas petition because it did not make clear that he had exhausted all state remedies. Nunnemaker then filed a second petition for habeas relief in the California Supreme Court, and that petition was denied. The district court

denied Nunnemaker's second petition holding that his state procedural default barred review of the Fifth and Sixth Amendment challenges to the psychiatrist's testimony.

[1] Under the Supreme Court's recent decision in *Harris v. Reed*, 109 S.Ct 1038 (1989), a procedural default bars review in federal habeas proceedings only if the last state court ruling on a case states the basis of its decision. Procedural default alone will not bar federal review; the state court's ruling must have been based at least in part on an adequate and independent state procedural rule. [2] In this case, the California Supreme Court was the last state court to render judgment. From the record before it, the Court could not say that the California Supreme Court's denial of Nunnemaker's final petition, without cause or comment, was based on a procedural default rather than on the underlying merits of Nunnemaker's claims. The rationale and plain language of *Harris* require that where a state supreme court does not plainly state in its summary denial of an original habeas petition that its ruling rests on a state procedural bar, federal review is not precluded.

[3] Because Nunnemaker did show that his trial counsel's performance was not within the range of

competence demanded of attorneys in criminal cases, the court affirmed that part of the district court's ruling.

COUNSEL

Juliana Drous, San Francisco, California, for the petitioner-appellant.

Ronald E. Niver, Deputy Attorney General, San Francisco, California, for the respondent-appellee.

ORDER

The opinion is *Nunnemaker v. Ylst*, No. 89-15050, slip op. (9th Cir. Feb. 21 1990), is amended as follows:

Slip op. at 1842, line 12

The sentence beginning with "Here, the California Supreme Court" is deleted and replaced by the following sentence:

Here, the California Supreme Court was the "last state court to render judgment in the case" because Nunnemaker's last filing with that court was an *original habeas petition* raising again his Fifth Amendment challenge to the state psychiatrist's testimony.

Slip op. at 1842, footnote 4

The first sentence in the footnote is deleted. The following sentence is added after the last sentence in the footnote:

Our holding is expressly limited to cases in which the California Supreme Court denies, without comment or case citation, original habeas petitions.

Slip op. at 1843, footnote 5

The original footnote is deleted and replaced by the following footnote:

In *Ellis v. Lynaugh*, 873 F.2d 830, 838 (5th Cir.), *cert. denied,* ___ U.S. ___, 110 S.Ct. 419 (1989), the Fifth Circuit held that, where a state trial court denied habeas relief on state procedural default grounds but the appellate court "denied relief without written order," federal review of the petitioner's claims was barred by the procedural default. It is not clear, however, whether the state appellate court in *Ellis v. Lynaugh* summarily *affirmed* the trial court's denial of habeas relief on petition for review, *see* Tex. Crim. Proc. Code Ann. § 4.04.2 (1987), or denied an *original habeas petition. See* Tex. Crim. Proc. Code Ann. § 4.04.1 (1987); *see also Ellis v. Lynaugh,* 873 F.2d at 838. Because our decision in this case rests on the fact that the California Supreme Court summarily denied Nunnemaker's *original habeas petition*,

we express no opinion on the Fifth Circuit's decision in *Ellis v. Lynaugh.*

The panel has voted to deny the petition for rehearing and to reject the suggestion of rehearing en banc. The full court has been advised as to the suggestion of rehearing en banc, and no judge has requested a vote on en banc consideration.

The petition for rehearing is DENIED and the suggestion of rehearing en banc is REJECTED.

OPINION

PREGERSON, Circuit Judge:

Owen Duane Nunnemaker, a California state prisoner, appeals the district court's dismissal of his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. A California jury convicted Nunnemaker of first degree murder under Cal. Penal Code § 187. At trial, a psychiatrist called by the state prosecutor gave testimony on statements made by Nunnemaker in a post-arrest interview. Nunnemaker contends that the admission of the psychiatrist's testimony violated his Fifth and Sixth Amendment rights, that his Fifth and Sixth Amendment claims are not barred by procedural default, and that he received ineffective assistance of counsel. In light of the

Supreme Court's recent decision in *Harris v. Reed,* ___ U.S. ___, 109 S.Ct. 1038 (1989), decided after the district court ruled on Nunnemaker's petition, we reverse in part and remand the case to the district court for consideration of Nunnemaker's Fifth and Sixth Amendment challenges to his conviction. We affirm the district court's judgment that Nunnemaker was not deprived to effective assistance of counsel.

BACKGROUND

On January 30, 1976, Owen Duane Nunnemaker was convicted in California state court of first degree murder. He was sentenced to life in prison.

At trial, Nunnemaker introduced expert testimony to establish capacity defense then available under California law. To rebut this testimony the state prosecutor called as a witness a psychiatrist who interviewed Nunnemaker two days after his arrest. At the time of the interview, Nunnemaker was told that the psychiatrist was working for the prosecution. Nunnemaker, however, was not informed that he had the right to remain silent and the right to an attorney. At trial, defense counsel made several specific objections to certain statements made by the state's psychiatrist, but failed to challenge the entire testimony on the grounds that it was based on an interview

conducted in violation of Nunnemaker's Fifth and Sixth Amendment rights.

On direct appeal to the California Court of Appeal, Nunnemaker raised for the first time his federal constitutional challenges to the testimony of the state's psychiatrist. Affirming the conviction, the state appellate court expressly avoided these challenges and held that "the failure to interpose an objection during trial preclude[d its] consideration on review." The state appellate court, however, considered on the merits -- and rejected -- Nunnemaker's ineffective assistance of counsel claim. On direct appeal, the California Supreme Court denied Nunnemaker's petition for hearing, without comment or case citation, on September 27, 1978.

Nunnemaker petitioned the California courts for a writ of habeas corpus. In his habeas petitions, he raised, among other claims, his federal constitutional challenges to the testimony of the state psychiatrist and his ineffective assistance of counsel claim. His petitions were denied.[1/]

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1. The Sonoma County Superior Court denied Nunnemaker's petition on February 25, 1985. The California Court of Appeal for the First Circuit denied his petition in late 1985. The California Supreme Court denied his first petition on December 3, 1986, and his second petition on April 7, 1988.

Nunnemaker then filed a habeas petition under 28 U.S.C. § 2254 in the United States District Court for the Northern District of California. The district court dismissed the petition without prejudice because the petition did not make clear whether all state remedies had been exhausted.[2/] Nunnemaker filed a second petition for

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2. The district court stated:

> The petition is not entirely clear as to the procedural history of this matter. Petitioner states that none of his claims were raised by way of direct appeal in the California courts. However, petitioner did present these and other claims to the California Court of Appeal and Supreme Court by way of a habeas petition. The California Supreme Court denied the petition, citing *In Re Waltreus,* 62 Cal.2d 218, 225 (1965) and *In Re Swain*, 34 Cal.2d 300, 304 (1949). These citations are cryptic. *Walthus* holds that arguments rejected on appeal will not be reviewed again in habeas; thus the implications of this citation contradict petitioner's assertion that he did not raise the claims on appeal. *Swain,* in contrast, holds that habeas claims not pleaded with sufficient particularity must be dismissed without prejudice. This latter citation implies that at least some of petitioner's claims were not presented on appeal, and the California Supreme Court declined to consider their merits on procedural grounds.

habeas relief in the California Supreme Court, arguing again that his statements to the state prosecution psychiatrist were "clearly inadmissible," and stating in greater particularity his claim of ineffective assistance of counsel. That petition was also denied, without comment or case citation, by the California Supreme Court on April 7, 1988.

Nunnemaker filed another federal habeas petition. The district court issued an Order to Show Cause on July 8, 1988. On December 9, 1988, the district court denied the petition. The court held that Nunnemaker's state procedural default barred review of the Fifth and Sixth Amendment challenges to the prosecution's psychiatrist testimony, and that Nunnemaker had not been deprived of effective assistance of counsel.

> As to any claims raised on appeal to the state and rejected on the merits, petitioner has exhausted his state remedies and this court can hear his habeas petition.... However, any claims not raised on appeal, and whose merits the state courts have not considered on habeas, must be dismissed....

District Court Ordered, September 8, 1987, at 2.

Nunnemaker filed a timely notice of appeal. This court has jurisdiction over the district court's final order under 28 U.S.C. § 2253.

STANDARD OF REVIEW

We review the district court's denial of habeas corpus relief de novo. *McKenzie v. Risley*, 842 F.2d 1525, 1531 (9th Cir.) (en banc), *cert. denied*, 109 S.Ct. 250 (1988). The question whether Nunnemaker was deprived of effective assistance of counsel is a mixed question of fact and law reviewed de novo. *Strickland v. Washington*, 466 U.S. 668, 698 (1984); *Deutscher v. Whitley*, 884 F.2d 1152, 1155 (9th Cir. 1989).

DISCUSSION

I. Procedural Bar

This case presents the issue whether the California Supreme Court's denial of an original petition for writ of habeas corpus without comment or case citation constitutes a "plain statement" sufficient to establish the procedural default bar of federal habeas review under the Supreme Court's recent decision in *Harris v. Reed*, 109 S.Ct. 1038. We hold that it does not.

The Supreme Court has held that a state prisoner barred by procedural default from raising a federal constitutional claim in state court "could not litigate that

claim in a § 2254 habeas corpus proceeding without showing cause for and actual prejudice from the default." *Engle v. Isaac*, 456 U.S. 107, 110 (1982) (citing *Wainwright v. Sykes*, 433 U.S. 72 (1977)). In *Harris v. Reed*, the Supreme Court applied this rule, but held that "a federal claimant's [state] procedural default precludes federal habeas review . . . only if the *last* state court rendering a judgment in the case rests its judgment on the procedural default." 109 S.Ct. at 1043 (emphasis added.) The Court explained that *Wainwright v. Sykes'* holding that a state procedural default may bar federal habeas review is based on the adequate and independent state ground doctrine, under which the Court "will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Id.* at 1042 (citing *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Murdock v. City of Memphis*, 20 Wall. 590, 635-36 (1875)). The Court in *Harris* applied the "'plain statement' rule" of *Michigan v. Long*, 436 U.S. 1032, 1042 and n.7, to state prisoner cases on federal habeas review, and held that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last

state court rendering judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Harris v. Reed*, 109 S.Ct. at 1043 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985)).

[1] Under *Harris*, then, a procedural default bars review in federal habeas proceedings only if the last state court ruling on a case states the basis of its decision. Procedural default alone does not bar federal review; the state court's ruling must have been *based*, at least in part, on an "adequate and independent" state procedural rule. *Harris v. Reed*, 109 S.Ct. at 1042. *Harris* undertakes to resolve the problem -- often faced by district courts -- of discerning from an ambiguous state court ruling the basis of a decision to deny habeas relief to a state prisoner raising federal constitutional claims. The plain statement requirement ensures that federal courts will decline to review state prisoners' federal constitutional claims only where required by the interests of comity.[3]

[2] Here, the California Supreme Court was the "last state court to render judgment in the case" because

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3. Where comity does not require it, federal courts should not deny review. "[T]he federal courts . . . have a primary obligation to protect the rights of the individual that are embodied in the Federal Constitution." *Harris v. Reed*, 109 S.Ct. at 1045 (Stevens, J., concurring).

Nunnemaker's last filing with that court was an *original habeas petition* raising again his Fifth Amendment challenge to the state psychiatrist's testimony.[4] That court did not clearly and expressly state its reliance on Nunnemaker's procedural default when it denied his final habeas petition. The petition raised Nunnemaker's objection to the testimony of the state's psychiatrist and Nunnemaker's ineffective assistance of counsel claim. From the record before us, we cannot say that the California Supreme Court's denial of Nunnemaker's final petition, without comment or case citation, was based on a procedural default rather than on the underlying merits of Nunnemaker's claims. The rationale and plain language of *Harris*, require that, where, as here, a state supreme court does not plainly state in its summary denial of an original habeas petition that its ruling rests on a state procedural bar, federal habeas review is not precluded.[5]

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4. Under California law, a state prisoner seeking collateral review of his or her conviction may file separate, independent habeas petitions in the superior court, court of appeal, and supreme court. Cal. Penal Code § 1475. In addition, however, a state prisoner whose habeas petition is denied in the court of appeal may file a petition for review of that denial in the California Supreme Court. Cal. Penal Code § 1506. In *McQuown v. McCartney*, 795 F.2d 807, 809-10 (9th Cir. 1986), we held that when a habeas case is before the California Supreme Court on a *petition for hearing*, rather than as an *original habeas petition*, a summary denial by the state supreme court is not a decision on the merits of the petition. *See also Tacho v. Martinez*, 862 F.2d 1376, 1378-80 (9th Cir. 1988) (applying *McQuown* and holding that the Arizona Supreme Court's *denial of review* of a trial court denial of habeas relief without case citation or comment was not a decision on the merits.) *Cf. Thompson v. Procunier*, 539 F.2d 26, 28 (9th Cir. 1976) ("Where a petition for a writ of habeas corpus presenting a federal constitutional question is denied by a state court with no reason given, we will assume that the state court has had an opportunity to pass upon the merits of the issue and has resolved it against the petitioner.").

McQuown does not affect the present case, because the California Supreme Court denied Nunnemaker's *original habeas petition* on April 7, 1988. That ruling was a "judgment" under *Harris*, and was the last rendered by a state court in Nunnemaker's case. We do not now address the question whether, in light of *Harris v. Reed*, the California Supreme Court's summary denial of a *petition for hearing* on a denial of habeas relief based on a procedural rule bars federal habeas review. Our holding is expressly limited to cases in which the California Supreme Court denies, without comment or case citation, original habeas petitions.

5. In *Ellis v. Lynaugh*, 873 F.2d 830, 838 (5th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 419 (1989), the Fifth Circuit held that, where a state trial court denied habeas relief on state procedural default grounds but the appellate court "denied relief without written order," federal review of the petitioner's claims was barred by the procedural default. It is not clear, however, whether the state appellate court in *Ellis v. Lynaugh* summarily

In fact, the Supreme Court discussed in *Harris* the issue now before us. The Court addressed concerns raised over the burden the plain statement requirement would place on state courts ruling on habeas petitions. The Court stated that "a state court that wishes to rely on a procedural bar rule in a one-line *pro forma* order easily can write that 'relief is denied for reasons of a procedural default.'" *Harris v. Reed*, 109 S.Ct. at 1044 n.12. The California Supreme Court did not do that in this case.

The district court carefully reviewed Nunnemaker's habeas petitions, but did not have the benefit of the Supreme Court's later clarification of federal habeas law in *Harris*. We hold that the district court was not barred from reviewing Nunnemaker's federal constitutional claims concerning the testimony of the state's psychiatrist.

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affirmed the trial court's denial of habeas relief on petition for review, *see* Tex. Crim. Proc. Code Ann. § 4.04.2 (1987), or denied an *original habeas petition*. *See* Tex. Crim. Code Ann. § 4.04.1 (1987); *see also Ellis v. Lynaugh*, 873 F.2d at 838. Because our decision in this case rests on the fact that the California Supreme Court summarily denied Nunnemaker's *original habeas petition*, we express no opinion on the Fifth Circuit's decision in *Ellis v. Lynaugh*.

II. Ineffective Assistance of Counsel

Nunnemaker also contends that he was deprived of effective assistance of counsel, and that federal habeas relief should be granted for that reason.[6/] This Sixth Amendment ineffective assistance of counsel claim is based on Nunnemaker's trial counsel's failure to object to the admission of the state psychiatrist's testimony on Fifth and Sixth Amendment grounds. The district court concluded that "[d]efense counsel was clearly acting as the 'counsel' guaranteed by the Sixth Amendment." We agree.

An ineffective assistance of counsel claim has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland v. Washington, 466 U.S. 668, 687 (1984). A convicted defendant complaining of the ineffectiveness of counsel's assistance must show that counsel's

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6. Nunnemaker raised this claim on direct appeal in the state court proceedings, and the state appellate court decided the merits of the claim. The state has made no argument that this claim was not properly before the district court. The district court correctly reached the ineffective assistance claim in the its review of Nunnemaker's habeas petition.

representation "fell below an objective standard of reasonableness." *Id.* at 688.

The trial record demonstrates that Nunnemaker's counsel vigorously objected to parts of the psychiatrist's testimony on various grounds. Further, because the state's psychiatrist was subject to potentially damaging cross examination, trial counsel's decision to allow the testimony, make specific objections, and impeach the witness on bias and credibly grounds may well have been a sound trial tactic.[7]

[3] Nunnemaker has not shown that his trial counsel's performance "was not 'within the range of competence demanded of attorneys in criminal cases.'" *Id.* at 687 (quoting *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970)).

CONCLUSION

For these reasons, the judgment of the district court is AFFIRMED in part and REVERSED and REMANDED in part.

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7. This was the conclusion reached by the state appellate court on direct appeal.

APPENDIX B

FILED: December 9, 1988
William L. Whittaker
Clerk, U.S. District Court
Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

OWEN DUANE NUNNEMAKER
Petitioner,
v.
EDDIE YLST,
Respondent.

No. C-88-1828 TEH
ORDER

This matter comes before the court on petitioner's petition for a writ of habeas corpus. After being convicted of first degree murder, petitioner was confined to the California Medical Facility at Vacaville. Petitioner contends that he is unlawfully confined because 1) statements he made to a prosecution psychiatrist were obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), and were erroneously admitted at trial, 2) his attorney was incompetent for failing to object to the introduction of the psychiatrist's testimony, 3) the evidence introduced at trial was insufficient to support a verdict of first degree murder, and 4) the prosecutor's actions constituted prejudicial misconduct. Having reviewed the

papers and the record in this case and good cause appearing, the petition is denied for the reasons set forth below.

DISCUSSION

I. Whether this Court is Barred from Reviewing Petitioner's Claim that his Statements to a Prosecution Psychiatrist were Erroneously Admitted.

Under California law, the failure to make a specific and timely objection at trial to the testimony of a prosecution psychiatrist who examined the defendant without admonishing him of his rights under Miranda, bars the issue from later appeal. People v. Bennett, 60 Cal.App.3d 112, 116 (1976). In petitioner's case, defense counsel objected to certain statements made by the prosecution psychiatrist, but failed to raise the issue that the entire testimony was based on an interview which violated petitioner's rights under Miranda and the fifth and fourteenth amendments. Consequently, this issue was never raised on appeal to the California Court of Appeals or the California Supreme Court.

Federal courts require that a state prisoner exhaust the remedies available in state courts before presenting a habeas corpus claim for federal review. 28 U.S.C. Sections 2254(b),(c); Rose v. Lundy, 455 U.S. 509 (1982); McNeeley v. Arave, 842 F.2d 230, 231 (9th Cir. 1988).

The purpose of the exhaustion requirement is to provide the highest state court with a fair opportunity to rule on the merits of each and every issue petitioner seeks to raise in federal court. Granberry v. Greer, 107 S.Ct. 1671, 1675 (1987). Where, because of a procedural default, the state has not been afforded this opportunity, federal courts will hear a claim only if the petitioner can show both cause for the procedural default and actual prejudice. Engle v. Isaac, 456 U.S. 107, 129 (1982), aff'g Wainwright v. Sykes, 433 U.S. 72 (1977). Cause for procedural default will only be found when a "constitutional claim is so novel that its legal basis is not reasonably available to counsel." Reed v. Ross, 468 U.S. 1 (1984). Where a claim is as well known and frequently litigated as Miranda, counsel's decision not to raise it will only constitute cause for procedural fault if counsel's assistance is found to have been ineffective. Engle, 456 U.S. at 134; Murray v. Carrier, 477 U.S. 477, 492 (1986). As discussed below, this court rejects petitioner's contention that his trial counsel was ineffective.

Thus, in deference to the state courts and the laws of judicial comity, this court is barred from considering petitioner's claim that the statements he made to the prosecution psychiatrist were elicited in violation of

Miranda and his fifth and fourteenth amendment rights and were erroneously admitted at trial.

II. Whether Trial Counsel's Failure to Object to the Testimony of the Prosecution Psychiatrist Deprived Petitioner of the Effective Assistance of Counsel.

To prove ineffective assistance of counsel, petitioner must allege that counsel made specific errors so serious that he was not acting as 'counsel' guaranteed by the sixth amendment and thus, that the proper functioning of the adversarial system and the reliability of the trial were undermined. Strickland v. Washington, 466 U.S. 668 (1984). This court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct. Id. at 668.

Petitioner contends that he was deprived of the effective assistance of counsel because his trial counsel failed to object to the admission of the prosecution psychiatrist's testimony. Petitioner states that defense counsel could have avoided making numerous objections to specific aspects of the prosecution psychiatrist's testimony by objecting to the entire testimony on the grounds that petitioner was not warned that he could remain silent, that any statements made could be used against him or that he had the right to consult an attorney. See Miranda v. Arizona, 384 U.S. 436; see also

Estelle v. Smith, 451 U.S. 454, 461-69 (1981) (defendant must be warned that he has a right to remain silent before being questioned by a psychiatrist and has a right to consult with an attorney about his participation in the exam).

However, the efficacy of counsel's tactics is not an issue for this court. See Bashor v. Risley, 730 F.2d 1228, 1241 (9th Cir. 1984), cert. denied, 469 U.S. 838 (1984); see also United States v. Mayo, 646 F.2d 369, 375 (9th Cir. 1980), cert. denied, 545 U.S. 1127 (1981); see also Jones v. Barnes, 463 U.S. 745 (1983) (defense counsel has no constitutional duty to raise every nonfrivolous issue requested by defendant). Counsel's vigorous objections to specific aspects of the psychiatrist's testimony clearly establish the presence of an adversarial element at petitioner's trial. Defense counsel was clearly acting as the 'counsel' guaranteed petitioner by the sixth amendment.[1/]

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1. Petitioner claims that, under Townsend v. Sain, 372 U.S. 293 (1963), he is entitled to an evidentiary hearing to determine why defense counsel did not move to exclude the prosecution psychiatrist's testimony. Townsend does not stand for such a proposition and such a hearing is not appropriate in this case.

Accordingly, this court finds that petitioner was not denied the effective assistance of counsel.

III. Wnether the Evidence set Forth at Trial was Sufficient to Sustain a Conviction of First Degree Murder.

This court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). Murder is the unlawful killing of another with malice aforethought. Cal. Penal Code Section 188 (West's 1988). To sustain a conviction of first degree murder the prosecutor must have presented sufficient evidence so that a reasonable jury might find that the murder was willful, deliberate, and premeditated. Cal. Penal Code Section 189 (West's 1988).

Petitioner contends that the evidence produced at trial does not support a finding that he committed first degree murder. It is unclear whether he claims that a rational jury could not have found that the killing was done with malice (required for both first and second degree murder) or that a rational jury could not have found that the killing was wilful, deliberate and premeditated (the additional elements required for first degree murder). However, after careful review of the

record, this court finds that a rational jury could have reasonably found all of these elements.

Malice may be implied when the killing proximately resulted from an act, the natural consequences of which are dangerous to life, and the act was deliberately performed by a person who acted with conscious disregard for life. People v. Mattison, 4 Cal.3d 177, 182-183 (1971); People v. Phillips, 64 Cal.2d 574, 587 (1966); see also Jackson v. Superior Court of City and County of San Francisco, 62 Cal.2d 521 (1965) (malice may be implied from assault with a dangerous weapon). The words willful, deliberate and premeditated should be construed in their ordinary dictionary meaning. People v. Orabuena, 56 Cal.App.3d 540 (1975). They refer to the mental state of someone who carefully weighs the course of action he is about to take and chooses to kill the victim after considering the reasons for and against it. People v. Fusselman, 46 Cal.App.3d 289 (1975). The jury may infer premeditation and deliberation from facts about how and what defendant did prior to the actual killing, the defendant's prior relationship and/or conduct with the victim, and the nature of the killing. People v. Anderson, 70 Cal.2d 15, 26-27 (1968).

The prosecution presented ample evidence from which a rational jury could have found malice, and willful, deliberate and premeditated intent to kill. The record showed that petitioner and his wife were estranged at the time of the killing, that petitioner's attempts at reconciliation had failed, and that he had been deprived of the companionship of his children. There was also evidence in the record to indicate that on May 31, 1975, petitioner armed himself with a pistol and extra ammunition, told a friend that he was going to put more notches on his gun, drove to his estranged wife's home and shot her in the chest. Petitioner claims that he did not intend to shoot her, but that the gun discharged during a struggle. However, two eyewitnesses testified that he shot his wife intentionally, from three feet away. There was also evidence that after the shooting he cut the telephone cord and refused to allow a doctor to be called.

This evidence, along with the other evidence in the record, supports a rational jury's conclusion that petitioner killed his wife with willful, deliberate, premeditated and malicious intent.

IV. Whether this Court is Barred from Reviewing Petitioner's Claims of Prosecutorial Misconduct and Improper Admission of Testimony.

Petitioner contends that the prosecution committed misconduct by misstating the evidence, by inducing witnesses to testify as it wished and by mischaracterizing petitioner. However, petitioner failed to object or request a curative admonition at trial. These steps are required by state law, in order to preserve the grounds for reversal. People v. Green, 27 Cal.3d 1, 27-36 (1980). As a result of this procedural default, these issues were not raised on appeal to the state courts and, as explained above, in the absence of cause and prejudice for the default, this court is precluded from considering the claim. See Wainwright v. Sykes, 433 U.S. 72 (1977). Here, where petitioner received the effective assistance of counsel, failure to object at trial is not cause for procedural default. Accordingly, this court is barred from considering petitioner's claim.

Petitioner also contends that he was entitled to a hearing on the ability of two allegedly emotionally disturbed witnesses to testify. However, petitioner failed to preserve this issue for further state review when it was not raised on appeal. Once again, petitioner's procedural

default is without cause and this court is barred from reviewing his claim by way of federal habeas corpus.

CONCLUSION

In sum, this court is barred by petitioner's procedural default from reviewing petitioner's claims that his Miranda and fifth and fourteenth amendment rights were violated by the admission of the prosecution psychiatrist's testimony at trial. Secondly, defense counsel's failure to object to the admission of the psychiatrist's testimony did not deprive petitioner of the effective assistance of counsel. Thirdly, this court finds that the evidence was sufficient to support a rational jury's conclusion that that petitioner willfully and maliciously killed his wife after premeditation and deliberation. Finally, petitioner's procedural defaults at trial and on appeal respectively, preclude this court from considering his claims that the prosecutor committed misconduct and that the testimony of two witnesses was erroneously admitted.

Accordingly, and good cause appearing, petitioner's petition for habeas corpus is HEREBY DENIED.

IT IS ORDERED.

DATED: December 9, 1988

THELTON E. HENDERSON
UNITED STATES DISTRICT COURT

APPENDIX C

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, vs. OWEN DUANE NUNNEMAKER, Defendant and Appellant.	1 Criminal 15379 (Super. Ct No. 7869-C)

Defendant, Owen Duane Nunnemaker, was tried by a jury on an information charging him with the murder of his wife, Alice (count one); assault with a deadly weapon (Pen. Code, § 245, subd. (a)) (count two), and a violation of former Penal Code sections 12022.5 (use of a firearm), 3024, subdivision (a), and 12022 (armed with a deadly weapon).[1/] The jury returned a guilty verdict of first-degree murder (Pen. Code, § 187), and found that the

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1. Section 3024 was repealed by statutes of 1976, chapter 1139, section 279; sections 12022 and 12022.5 were amended by statutes of 1976, chapter 1139, sections 304-305, and by statutes of 1977, chapter 165, sections 91-92.

enhancement allegations were true.[2] On appeal from the judgment entered on the verdict, defendant raises several claims of errors. We have examined the entire cause, including the evidence, and determine that only one of his claims is meritorious; accordingly, we modify the judgment of conviction and - as so modified - affirm the judgment. We discuss each claim ad seriatim.

Facts

In the afternoon of May 31, 1975, defendant - armed with an automatic weapon - forcibly entered the home of his estranged wife, Alice, and following a struggle fired a single shot from a distance of three feet mortally wounding the victim. As witnesses to the shooting attempted to assist the fallen victim, the defendant restrained them from summoning aid and cut the telephone cord preventing its use to call an ambulance. One of the foster children,[3] Linda (age 16 years),

2. A not guilty verdict was returned on count two.

3. For several years defendant and his wife had maintained their Sebastopol family residence as a licensed foster child placement facility. On the day of the shooting, four foster children (ranging in age from 7 to 17 years), the three pre-teenage Nunnemaker children, and a family friend, Mrs. Mickey Brower and her son, were present in the Nunnemaker residence. Mr. Adrian Turner, a foster child counselor, also resided

managed to exit the home and called the sheriff's office on a neighbor's telephone. When the officers arrived, Linda informed them of the shooting. After all but one of the children had exited, the officers entered the home and observed the victim lying on the floor of the living room and another foster child, Sherry (age 17 years), at her side. During their search, they discovered the defendant in a rear bedroom where apparently he had just telephoned the sheriff's office requesting an ambulance. Defendant offered no resistance and was placed under arrest and searched; several rounds of 9 millimeter ammunition were found in defendant's pocket; defendant led the officers to his car parked in front of the house where they observed the weapon used[4] lying on the front seat.

At trial, Linda, Sherry, and Mrs. Brower testified that the defendant appeared sober and calm immediately after the shooting; the three arresting officers gave similar testimony concerning their observations of defendant at the time of his arrest.

there but was not present.

4. It was stipulated at trial that the 9 millimeter German Luger pistol, retrieved from defendant's automobile in the course of a warranted search, was the actual death weapon.

The defendant testified that he went to the home for the purpose of delivering a birthday present and to visit his children, which permission was refused by the victim. That as he and the victim were standing at the door, the victim suddenly "launched herself toward me." Thereafter, he could not recall any of the ensuing events until he walked to his car with his son Shawn and gave him the birthday present; he then noticed he was holding a gun in his hand which he placed in his car. Upon reentering the house, and thereafter seeing his wife lying on the floor, he telephoned the sheriff's office from the rear bedroom. Defendant denied that he had intentionally shot his wife whom he loved deeply.

The defense introduced psychiatric testimony in support of a diminished capacity defense; on rebuttal, the prosecution presented conflicting psychiatric testimony.

I. Insufficiency of the Evidence

Defendant contends that there was no substantial evidence presented during trial to support the jury's implied finding of premeditation, deliberation and willfulness, or malice, warranting at a minimum that the judgment be modified to a lesser conviction or degree of crime (Pen. Code, § 1181, subd. 6). Relying on a series of decisions where such remedial procedure was invoked

(People v. Bassett (1968) 69 Cal.2d 122; People v. Anderson (1968) 70 Cal.2d 15; and People v. Wolff (1964) 61 Cal.2d 795) defendant argues that in light of the whole record there was no reasonable, credible and solid evidence presented to justify the jury's implied findings of the requisite mental states. Additionally, focusing on certain evidence introduced by the prosecution, he argues that the permissible inference of innocence based upon such evidence is binding upon the People as establishing a reasonable hypothesis of innocence of first-degree murder. (See People v. Estrada (1923) 60 Cal.App. 477.)[5/] Our review of the whole record and the evidence adduced leads to our conclusion that defendant's contentions have no merit.

Malice is express when there is manifested a deliberate intention unlawfully to kill a human being (People v. Wolff, supra, 61 Cal.2d 795, 819-820; Pen. Code, § 188) and implied where "'the killing proximately

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5. His principal reliance is placed upon evidence of defendant's intoxication when he made certain damaging admissions both before and at the time of the shooting, the evidence surrounding the struggle between defendant and the victim immediately before the shooting, the defective safety mechanism on the death weapon, and observations by an independent witness that defendant had acted "crazy" earlier that morning.

resulted from an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.'" (People v. Mattison (1971) 4 Cal.3d 177, 182-183; People v. Phillips (1966) 64 Cal.2d 574, 587.) Malice will be presumed when it is proven that the killing was committed by the defendant and nothing more need be shown. (People v. Conley (1966) 64 Cal.2d 310, 320.) Viewing the record in a light favorable to the People (People v. Reilly (1970) 3 Cal.3d 421, 425), the evidence that defendant went to the victim's home where - following a struggle - he forcibly gained entrance, thereafter pulled out the weapon and from a distance of a few feet, took deliberate aim and shot the victim, is not only sufficient to support a presumption of malice but is also sufficient to support an inference of express malice. (People v. Williams (1969) 71 Cal.2d 614, 624.)

Defendant argues that the psychiatric testimony produced in his behalf constituted substantial evidence negating his ability to harbor malice; additionally, that the conflicting psychiatric testimony produced by the prosection was legally insubstantial and thus a conviction of murder on such evidence cannot be sustained.

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Defendant is mistaken. It is well established that "'"[i]f the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.'" [Citations.] The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, . . . [and] [t]he appellate court must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt. [Citations.]" (People v. Reilly, supra, 3 Cal.3d 421, 425.) And, under certain circumstances, the jury may even properly reject uncontradicted psychiatric testimony. (People v. Coogler (1969) 71 Cal.2d 153, 166 [cert. den. 405 U.S. 971].) "'The chief value of an expert's testimony in this [mental illness] field, as in all other fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion; . . .' [Citation.]" (People v. Bassett, supra, 69 Cal.2d 122, 141.) Herein, while defendant's expert testified that the defendant had acted without malice, he also conceded the possibility that the defendant intended to kill his wife. Moreover, the prosecution's expert who had conducted an

independent examination of the defendant (cf. People v. Bassett, supra, where the prosecution's psychiatric testimony was based upon hypothetical questions alone) found similar psychiatric symptoms which in his opinion did not evidence a mental illness of such a serious nature as to preclude the ability to form the requisite state of malice. Such evidence, substantial in nature, was sufficient to support the jury's implied finding of malice which must be accepted on appeal. (People v. Reilly, supra, 3 Cal.3d 421; People v. Redmond (1969) 71 Cal.2d 745; see also People v. Anderson, supra, 70 Cal.2d 15; People v. Bassett, supra, at p. 139.) Nor is a contrary conclusion compelled by reason of the conflicting testimony given by Linda and Sherry as to whether the fatal shot occurred accidentally during the struggle or as a result of a deliberate act following that initial altercation, since it is for the jury in the final analysis to determine the effect and value of the evidence, including impeachment. (See Evid. Code, §§ 312, 780; People v. Muir (1966) 244 Cal.App.2d 598, 601.) Accordingly, we find defendant's contention to be without merit.

Defendant further contends that the record is barren of any solid evidence to support the finding of premeditation, deliberation and willfulness necessary to

sustain a first-degree murder conviction. With emphasis on the language of our Supreme Court in People v. Anderson, supra, 70 Cal.2d 15, he argues none of the evidence falls within any of the three classifications identified in Anderson essential to support an inference of the necessary mental states underlying a first-degree murder conviction. For the reasons which follow, we find this contention likewise unpersuasive.

As correctly stated by the People, the controlling test is "the ability of the defendant to maturely and meaningfully contemplate the gravity of his intended act." (People v. Sedeno (1974) 10 Cal.3d 703, 713.) While the statutory definition requires "'substantially more reflection than may be involved in the mere formation of a specific intent to kill . . . [¶] [t]he true test is not the duration of time as much as it is the extent of the reflection.'" (People v. Wolff, supra, 61 Cal.2d 795, 821.) In People v. Anderson, supra, 70 Cal.2d 15, the Supreme Court delineated three types of evidence which, singly or collectively, are necessary to sustain a finding of premeditation and deliberation: (1) planning activity directed to and explainable as intended to result in the killing; (2) prior relationship and/or conduct supporting an inference of evil motive; (3) and the manner of killing

itself. Unlike the factual circumstances reflected in the cases reviewed in Anderson, the record herein demonstrates sufficient evidence of premeditation and deliberation under any of the Anderson topologies. Prior to the actual killing defendant armed himself with a pistol and extra ammunition, openly stated he was going to put "a couple more notches" on his pistol, proceeded to his wife's residence where he forcibly gained entrance after a brief struggle and then delivered the fatal shot at pointblank range. Such evidence amply supports an inference that he had soberly reflected upon his contemplated act and formed an intent to kill his wife well before he arrived at her residence. The forcible entry and deliberate discharge of his pistol may be readily reconciled with a theory of a preconceived plan consummated after mature reflection. (Cf. People v. Hillery (1965) 62 Cal. 2d 692 [cert. den. 386 U.S. 938; rehg. den. 386 U.S. 1000]; People v. Kemp (1961) 55 Cal.2d 458 [cert. den. 368 U.S. 932].) The evidence of motive tending to establish preexisting reflection (Anderson at p. 27) was even more compelling; not only was it established that defendant had sometime earlier threatened to "blow her [his wife's] head off with a shotgun," but at the time of the killing the separation and

pending divorce had deprived him of a substantial part of his income as well as access to his children. Moreover, his stated belief that his wife was engaged in a meretricious relationship with Turner contradicted his professed affection towards her from which the jury could reasonably conclude that defendant, angered and embittered, was motivated to deliberately and intentionally kill his wife. The act of intentionally firing the pistol from close range into the victim's chest strongly supports an inference of premeditation. Unlike People v. Anderson, supra, 70 Cal.2d 15, 21 (involving multiple random stabbing upon the victim's body), the evidence here disclosed a single, well-placed lethal shot fired from a distance of approximately three feet. (Cf. People v. Hillery, supra, 62 Cal.2d 692.) Although testimony was presented supporting defendant's version of an accidental shooting during the struggle (including evidence of the defective safety mechanism on the Luger), such conflicting evidence related to a disputed question of fact for resolution by the jury. Clearly, the jury rejected a theory of accidental shooting in concluding that the killing was intentional. Where, as here, that determination is based upon substantial evidence, the jury's finding may not be

disturbed. (People v. Reilly, supra, 3 Cal.3d 421; People v. Redmond, supra, 71 Cal.2d 745.)

Our review of the whole record reveals an aggregate of substantial evidence more than adequate to support an inference that the defendant was mentally capable to meaningfully reflect upon the gravity of his act and upon which the jury could reasonably base its implied findings of willfulness, premeditation, deliberation, and malice. (See People v. Anderson, supra, 70 Cal.2d 15.) Such findings must be accepted on appeal. (People v. Reilly, supra, 3 Cal.3d 421; People v. Redmond, supra, 71 Cal.2d 745.)

II. Miranda Error

Defendant further contends that prejudicial error was committed in allowing the testimony of the prosecution psychiatrist, Dr. Lowe, because he had not been advised of his Miranda rights (Miranda v. Arizona (1966) 384 U.S. 436) prior to the psychiatric interview; in addition, that the failure of his trial counsel to object to such testimony on Miranda grounds should not be considered on the issue of waiver. Defendant's contentions have no merit.

While it is generally established that Miranda principles apply to custodial interrogation of a defendant by a prosecution psychiatrist (People v. Bennett (1976) 58

Cal.App.3d 230, 236-237 and fn. 3) an objection based upon a Miranda violation cannot be raised for the first time on appeal. (People v. Bennett (1976) 60 Cal.App.3d 112, 116; In re Dennis M. (1969) 70 Cal.2d 444, 461-462.) Although the record is silent as to whether defendant was timely advised of such rights, the failure to interpose an objection during trial precludes our consideration on appeal. (People v. Bennett, supra, 60 Cal.App.3d 112, 116-117.)

Inferentially, defendant claims that the failure of his trial counsel to object effectively deprived him of a meaningful defense of diminished capacity in that the introduction of the prosecutor's psychiatric testimony conflicted with that of the defense. His argument is unsound. In order to successfully assert a claim of ineffective counsel, defendant has the burden of establishing such incompetence. (People v. Camden (1976) 16 Cal.3d 808, 816-817; People v. Martinez (1975) 14 Cal.3d 533, 538) as demonstrable reality (People v. Stephenson (1974) 10 Cal.3d 652, 661.) Under such governing principles, the record must establish that counsel was either ignorant of the facts or the law resulting in a withdrawal of a crucial defense that reduced the trial to a farce and a sham. (People v. Martinez,

supra, at p. 538.) Absence such affirmative showing, defendant is entitled to no relief. (People v. Jenkins (1975) 13 Cal.3d 749, 754-755 [cert. den. 423 U.S. 860].) Defendant has failed to make the requisite showing. Moreover, we cannot say that counsel's failure to object was not motivated by reasons of trial strategy or tactics. Defense counsel could readily have concluded that a tactical advantage could be gained through cross-examination of the expert witness revealing bias, the limited basis of his opinion and forensic experience in homicide cases. Failure to such assumed tactics does not demonstrate ineffectiveness and a party may not be permitted ""to gamble on a favorable decision and then raise such an objection in the event he is disappointed in the result.'" [Citation.]" (People v. Tappan (1968) 266 Cal.App.2d 812, 817.) Similarly, we see no merit in defendant's disjointed claim of involuntariness of his statements during the questioned psychiatric interview, in the absence of any objection based upon such grounds. Defendant fails to direct our attention to the relevant portion of the record (see Cal. Rules of Court, rule 15(a)), nor has our examination thereof disclosed such an objection. We find no error herein.

III. Prosecutorial Misconduct

Defendant further complains of prejudicial misconduct committed by the prosecutor and his "advocate" in engaging in a "McCarthy-type" attach maligning his character and motives in order to depict him as a "bad guy" in the eyes of the jury. We have examined each of these claims and find them to be without merit.

To sustain a charge of misconduct it must be unequivocally demonstrated that the conduct involved a dishonest act or an attempt to persuade the court or jury by use of deceptive or reprehensible methods. (People v. Strickland (1974) 11 Cal.3d 946, 955; People v. Beivelman (1968) 70 Cal.2d 60, 75 [cert. den. 406 U.S. 971].) We first observe that none of the claimed acts of misconduct were objected to at trial; generally, a failure to raise such timely objection forecloses consideration of such misconduct on appeal. (See People v. Jenkins (1974) 40 Cal.App.3d 1054, 1057; People v. Asta (1967) 251 Cal.App.2d 64, 87; and People v. Ney (1965) 238 Cal.,App.2d 785, 790.) The record demonstrates that, with one exception (a leading question), defendant both failed to object to the cited instances or request an assignment of misconduct or curative admonition. Nonetheless, defendant urges that his failure to object may be excused

when the case is "closely balanced . . . [and] the misconduct contributed materially to the verdict or unless the harmful results . . . could not have been obviated by a timely admonition to the jury." (People v. Varnum (1969) 70 Cal.2d 480, 488 [cert. den. 406 U.S. 971]; People v. Ney, supra, at p. 790.) The record does not support defendant's assertion in order to base a claim of waiver. The questioned conduct related to certain statements made by the prosecutor during opening statement and closing argument in which the defendant was characterized as a lazy inebriated who enslaved his wife to his every bidding, and that he had stated during the telephone call to the sheriff's office that he had shot his wife. The prosecutor's statements reflecting upon defendant personally were clearly relevant to the issue of motive on the part of the defendant. (See People v. Clifton (1967) 248 Cal.App.2d 126, 133.) While the tape recording of the subject telephone call indicates that defendant did not make the statement attributed, the actual tape recording was played before the jury several times so that they could not possibly have been misled by the prosecutor's mistaken recollection of the substance of that call; indeed, the defendant himself testified that he believed he had made that admission on that occasion. In

any event, there was independent evidence that defendant did shoot his wife. The testimony[6/] by Dr. Lowe (characterized as the prosecutor's "advocate"), elicited in response to defense counsel's question, was relevant for the limited purpose of establishing matters upon which he relied in forming his expert opinion. (See Evidence Code, section 801. subd. (b); Witkin, Cal. Evidence (2d ed. 1966) section 410, p. 368.) No "misconduct" by the witness is manifested. Defendant's remaining claim of "unethical

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6. - The actual testimony complained of, as underscored, is reported as follows:
"Q [By defense counsel] I will rephrase it.
"A Taking that into consideration --
"Q I mean taking all of those things that he is an intelligent man and all of the other things into consideration, you wouldn't expect a man of his intelligence, that everybody has testified to, to go over there with the intent to kill his wife, would you?
"A <u>There is some evidence that I don't know whether it has been introduced into court or not, into this trial, that indicated at one point that he said, you know, if she leaves me, I will.</u>
"Q No, that's not been in here, no, no.
"A No. Okay, okay, that's --
"Q That's why Mr. Gallagher [the prosecutor] didn't bring it in. Taking those things into consideration, you wouldn't expect him to go over there with the intent to kill, would you?
"A I don't know. I cannot say.

conduct," unsupported by the record, is determined to be groundless.

IV. Jury Instructions

Defendant next contends that the jury instructions on intoxication as related to the defense of diminished capacity were incomplete and failed to adequately distinguish the significance of evidence of voluntary intoxication bearing upon that defense from that involved in the general intent crime charged in count two. Our examination of the challenged instructions reveals the contention to be specious. The jury was properly instructed on all of the essential elements of the murder charge and on the effect of intoxication relevant to the defense of diminished capacity and the lesser included offenses of voluntary and involuntary manslaughter.[7] Moreover, in giving CALJIC instruction No. 4.20 (voluntary intoxication not a defense to a general intent crime) the court expressly limited that instruction to the aggravated assault charge contained in count two, of which defendant was ultimately acquitted. Defendant's companion argument that the court was obliged to give a

7. The instructions given included standard CALJIC instructions Nos. 4.21, 4.30, 8.41, 8.47 and 8.77 (CALJIC 3d ed.).

"particularized" instruction regarding the defendant's level of intoxication is unsound. Since the court gave the required instructions concerning circumstantial evidence (CALJIC Nos. 2.00-2.02 (CALJIC 3d ed.)), as conceded by defendant, no further instructions were required or appropriate, particularly in the absence of any request by the defendant. (See generally People v. Rocha (1978) 80 Cal.App.3d 972, 980, and authorities there collected.) We find no error here.

V. Enhanced Punishment

Relying on People v. Bennett, supra 60 Cal.App.3d 112, defendant argues that the enhanced punishment based upon the jury findings made under the provisions of Penal Code section 3024, subdivision (a), and 12022 may not stand.

Our Supreme Court held in People v. Walker (1976) 18 Cal.ed 232, 243-244, that a finding pursuant to Penal Code section 12022.5, is of no legal effect in a case involving a sentence of life imprisonment upon conviction of the basic crime in which a firearm was used. "Defendant would thereby be sentenced to life imprisonment plus a consecutive term of five years to life, providing a prison sentence theoretically extending beyond death." (P. 243.) The facts of the case at bench fall

squarely within the prohibition of Walker; accordingly, any additional punishment imposed pursuant to said finding is invalid and must be stricken. Similarly, the punishment pursuant to Penal Code section 12022 can have no effect since it, too, would subject defendant to prison sentence beyond death.[8/] The enhancement imposed pursuant to section 12022 must also be stricken.[9/]

The superior court will modify the judgment, and abstract of judgment and commitment to state prison, by striking therefrom the punishment imposed pursuant to Penal Code sections 12022 and 12022.5; as so modified, the judgment is affirmed.

Racanelli, P.J.

WE CONCUR:

Elkington, J.

Low, J.**********/

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8. - The language and legislative intent of former section 12022 are substantially similar to those of section 12022.5 in providing for an additional punishment of at least five years' imprisonment. (See People v. Walker, supra, 18 Cal.3d 232, 241; People v. Chambers (1972) 7 Cal.3d 666, 671-672.)

9. - We recognize that former section 3024, subdivision (a), imposed a minimum term of imprisonment of two years. Since defendant is already subject to a minimum term of incarceration of seven years based on his life sentence (Pen. Code § 3046), the finding under section 3024, subd. (a), can serve no purpose for enhanced punishment. However, we note that the finding that defendant was armed at the time of the offense could have some future consequence. (See, e.g., Pen. Code, § 1203.06, subdivision (a)(1).) Therefore, we decline to strike the finding that defendant was armed within the meaning of section 3024, subdivision (a).

**********. Assigned by the Chairperson of the Judicial Council.

APPENDIX D

ORDER DENYING WRIT OF HABEAS CORPUS

Criminal No. 25449

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

In re NUMMEMAKER (OWEN DUANE)

on Habeas Corpus.

Petition for writ of habeas corpus DENIED.

(In re Swain (1949) 34 Cal.2d 300, 304; In re Waltreus (1965) 62 Cal.2d 218, 225.)

Original Signed - BIRD
Chief Justice

SUPREME COURT FILED: December 3, 1986
Lawrence P. Gill, Clerk

APPENDIX E

ORDER DENYING WRIT OF HABEAS CORPUS

No. S004531

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

IN RE OWEN DWAYNE NUNNEMAKER

ON

HABEAS CORPUS

Petition for writ of habeas corpus DENIED.

Original Signed
Acting Chief Justice

SUPREME COURT FILED: April 7, 1988
Lawrence P. Gill, Clerk

ORIGINAL

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

RESPONSE REQUESTED

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. 90-68

Supreme Court, U.S.
FILED
SEP 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

EDDIE S. YLST, Warden,

Petitioner,

v.

OWEN DUANE NUNNEMAKER,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to 18 U.S.C. section 3006A(d)(6) and Rule 46 of this Court, respondent OWEN DUANE NUNNEMAKER, by his counsel, respectfully requests leave of this Court to file the Response to the Petition for Writ of Certiorari to the Supreme Court as requested by this Court, without prepayment of fees or costs and to proceed in forma pauperis.

Respondent, OWEN DUANE NUNNEMAKER, has been incarcerated within California State Prison since his conviction in 1976. Because of his indigency, counsel was appointed to represent him on his appeal in the California appellate courts and in the United

States Court of Appeal for the Ninth Circuit.

DATED: September 6, 1990

Respectfully submitted,

JULIANA DROUS
214 Duboce Avenue
San Francisco, CA 94103
(415) 863-3580

Attorney for Respondent
OWEN DUANE NUNNEMAKER

DECLARATION OF OWEN DUANE NUNNEMAKER

IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF CALIFORNIA)
COUNTY OF SOLANO)

I, OWEN DUANE NUNNEMAKER, swear under penalty of perjury that the following is true and correct:

I am the respondent in the above-entitled case and currently am incarcerated at the California Medical Facility in Vacaville, California.

Because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor.

I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of defending the petition are true.

1. Are you presently employed? NO (Disabled)

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

---

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received: Last emplcyment was 1964 - wages about $1.65 per hour.

2. Have you received within the past 12 months any income from a business, profession, or other form of self-employment, or

in the form of rent payments, interests, dividends, or other source?

NO

a. If the answer is yes, describe each source of income, and state the amount received during the past 12 months.

3. Do you own any cash or checking or savings accounts?

NO

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property. NO

5. List the persons who are dependent on you for support and state your relationship to those persons.

None.

I understand that a false statement or answer to any questions in this declaration will subject me to penalties for perjury.

DATED: 9/11/90

OWEN DUANE NUNNEMAKER

On 9-14 90, 1990, before me, the undersigned, a Notary Public in and for the State of California, personally appeared OWEN DUANE NUNNEMAKER, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same. WITNESS my hand and official seal.

OFFICIAL SEAL
WILLIAM M. MOORS
NOTARY PUBLIC - CALIFORNIA
SOLANO COUNTY
My comm. expires AUG 3, 1993

NOTARY PUBLIC

No. 90-68

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1990

EDDIE S. YLST, WARDEN,

Petitioner,

v.

OWEN DUANE NUNNEMAKER,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JULIANA DROUS
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(415) 863-3580

Attorney for Respondent

QUESTION PRESENTED

Whether a state high court's denial of an original petition for writ of habeas corpus without comment or case citation constitutes a "plain statement" sufficient to establish the procedural default bar of federal habeas review under the Supreme Court's decision in Harris v. Reed, ___ U.S. ___, 109 S. Ct. 1038 (1989).

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OPINIONS BELOW

In addition to the opinions listed by petitioner, the decision of the California Supreme Court denying respondent's original petition for writ of habeas corpus should be included. This decision appears in the Petition for Writ of Certiorari in Appendix E.

No. 90-68

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1990

EDDIE S. YLST, WARDEN,

Petitioner,

v.

OWEN DUANE NUNNEMAKER,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Owen Duane Nunnemaker, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit opinion in this case. The opinion is reported at 904 F.2d 473 (9th Cir. 1990).

STATEMENT OF THE FACTS

After respondent Owen Duane Nunnemaker was arrested and in custody, the district attorney sent in a psychiatrist to interview him. After asking Mr. Nunnemaker his age and occupation, the psychiatrist told him that the district attorney had asked him to see Mr. Nunnemaker. At no time was Mr. Nunnemaker advised of his rights pursuant to Miranda v. Arizona. The psychiatrist proceeded to interview Mr. Nunnemaker regarding his marriage, the circumstances of the incident which led to the separation, his difficulties during the separation, and the circumstances that Mr. Nunnemaker recalled about the shooting. After collecting this information, the psychiatrist filed a five-page report with the district attorney.

The information charging Mr. Nunnemaker with murder and assault with a deadly weapon was filed in the Sonoma County Superior Court on August 21, 1975. At the jury trial, the prosecution in its rebuttal presented evidence of respondent's statements made during the interview with the prosecution psychiatrist. The jury found respondent guilty of murder in the first degree, but acquitted him on a separate assault charge.

On direct appeal to the California Court of Appeal, respondent raised federal constitutional challenges to the testimony of the prosecution psychiatrist. In affirming the conviction, the state appellate court avoided these challenges, holding that the failure to interpose a specific objection during trial precluded consideration on review. The California Supreme

Court denied respondent's petition for hearing on September 27, 1978.

Respondent filed petitions for a writ of habeas corpus raising federal constitutional challenges in the California state courts. The Sonoma County Superior Court denied a petition on February 25, 1979. The California Court of Appeal denied a petition in 1985. And the California Supreme Court denied an original petition on December 3, 1986, citing In re Waltreus, 62 Cal.2d 218, 225 (1965) and In re Swain, 34 Cal.2d 300, 304 (1949).

Mr. Nunnemaker then filed a habeas petition under 28 U.S.C. § 2254 in the United States District Court for the Northern District of California. This petition was dismissed without prejudice because it was not clear whether all state remedies had been exhausted.

Mr. Nunnemaker filed a second original petition for habeas relief in the California Supreme Court. After this petition was denied without comment or case citation, Mr. Nunnemaker filed another petition for habeas relief in the federal district court. The court issued an Order to Show Cause on July 8, 1988, but then denied the petition on December 9, 1988, holding that state procedural default barred review of the Fifth and Sixth Amendment challenges to the prosecution's psychiatric testimony. In so ruling, the district court did not have the benefit of this Court's clarification of federal habeas law in Harris v. Reed, ___ U.S. ___, 109 S. Ct. 1038 (1989), which was decided after the

district court issued its decision.

On appeal, the Ninth Circuit Court of Appeal, with the guidance of Harris v. Reed, reversed the ruling of the district court and held that where, as here, a state high court does not plainly state in its summary denial of an original habeas petition that its ruling rests on a state procedural bar, federal habeas review is not precluded. On May 25, 1990, the Ninth Circuit denied rehearing and amended its opinion.

The State of California filed a petition for a writ of certiorari in this Court on July 9, 1990.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The decision below does not raise the Question Presented in the petition.

The sole Question Presented by the Attorney General in its petition is whether Harris v. Reed, ___ U.S. ___, 109 S. Ct. 1038 (1989), holds that a state high court's denial of habeas corpus relief, which is not a decision on the merits under state law, forgives a procedural default expressly claimed by an intermediate state appellate court on direct review. However, that is not the question raised in this case. In its opinion in this case, the Ninth Circuit merely followed the rational and plain language of Harris v. Reed, supra, which requires that where a state high court does not plainly state in a summary denial of an original habeas petition that its ruling rests on a state procedural bar, federal habeas review is not precluded.

This Court held in Harris v. Reed, supra, that the plain statement rule" of Michigan v. Long, 463 U.S. 1032, 1042 and n.7, 103 S. Ct. 3469, 3477 (1983) applies in a case on federal habeas review as well as in a case on direct review. Harris v. Reed, supra, has settled the conflict among the Court of Appeals over the standard for determining whether a state court's ambiguous invocation of a procedural default bars federal habeas review. The Court explained that the procedural default rule of Wainwright v. Sykes, 433 U.S. 72 97 S. Ct. 2497 (1977) has its historical and theoretical basis in the "adequate and independent state ground" doctrine. The Supreme Court will not

consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on the state-law ground that is both "independent" of the merits of the federal claim and an "adequate" basis for the court's decision. The question whether a state court's reference to state law constitutes an adequate and independent state ground for its judgment may be rendered difficult by ambiguity in the state court's opinion. To avoid the difficulties associated with such ambiguity, this Court applied the "'plain statement' rule" of Michigan v. Long, supra, to federal habeas review and held that a procedural default does not bar consideration of a federal claim on habeas review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar. Harris v. Reed, 109 S. Ct. at 1043.

The California Attorney General puts forth all of the claims -- that applying the Long "plain statement" requirement to habeas cases would harm the interests of finality, federalism, and comity -- that were argued and rejected by this Court in Harris v. Reed, 109 S. Ct. at 1044-45. This Court recognized "these significant state interests," but stated "that applying Long to habeas burdens those interests only minimally, if at all. The benefits, in contrast, are substantial." Harris v. Reed, 109 S. Ct. at 1044.

The California Attorney General's entire argument is based on the erroneous premise that a decision denying an original petition for habeas corpus relief is not a decision on the

merits. This argument is put forth by the Attorney General without citing authority. (See Petition at 14, 15, 20, 31, 32.)

In Harris v. Superior Court, 500 F.2d 1124 (9th Cir. 1974), cert. denied, 420 U.S. 973 (1975), the Ninth Circuit conducted a careful review of the California Supreme Court's practice of denying habeas corpus petitions without opinion. They concluded that there is "no reason to suppose that a postcard denial without opinion is indicative of anything but a decision on the merits of the petition, except where a citation in the order tells us so." Id. at 1128. This rule has been applied consistently in the Ninth Circuit. See, e.g., LaRue v. McCarthy, 833 F.2d 140 (9th Cir. 1987); Kim v. Villalobos, 799 F.2d 1317 (9th Cir. 1986); McQuown v. McCartney, 795 F.2d 807 (9th Cir. 1986).

As the Ninth Circuit noted in its decision in this case, a denial of an original petition for habeas relief is distinguished from a denial of a petition for review of a lower court's denial of habeas relief. A denial of a petition for review or petition for hearing from a lower court's denial is not a decision on the merits because by its nature it relates back to the original filing in the lower court. In contrast, a denial of an original petition for habeas relief is a judgment in and of itself. It is not an affirmance of a lower court's decision.

Any reliance by the Attorney General on People v. Medina, 6 Cal.3d 484 (1972) and People v. Pacini, 120 Cal.App.3d 877 (1981) is misplaced. These cases involve the doctrine of law of

the case. Law of the case concerns the effect of an appellate court's ruling on a legal issue on subsequent proceedings in the same suit. Richer v. Superior Court, 63 Cal.App.3d 748, 757 (1976). Moreover, the doctrine generally relates to proceedings before final judgment. In contrast, here we are faced with a petition for habeas corpus relief brought in federal court after final judgment on a state habeas proceeding.

Both in People v. Medina and in People v. Pacini, the California courts held that a state prisoner's case should not be forever barred from review because an appellate court issued a summary denial of a petition for extraordinary relief. The Pacini court reasoned that "Without an opinion it is not possible to determine what merits were resolved . . ." People v. Pacini, 120 Cal.App.3d at 886. Both cases resulted in decisions allowing a state defendant proper review of his contentions. In contrast, the Attorney General here argues that once any state court denies a claim on procedural grounds, a state defendant can be forever denied review of federal constitutional claims by the federal courts.

Without a clear and express statement as to the reason for a denial of an original petition for habeas corpus, it is unclear if the denial was based on procedural default, its lack of merit, or for any other reason. The Ninth Circuit's opinion did not view Harris v. Reed, supra, as forgiving a procedural default when a state high court denies habeas relief without comment or case citation. Rather, because without comment or case citation,

it is not possible to know the reason for the denial of relief, the Ninth Circuit, following Harris v. Reed, supra, stated that procedural default cannot be presumed.

Harris v. Reed makes plain that the state court must unambiguously rely upon the procedural default as a basis for its disposition of the case. The California Supreme Court may have denied the petition on its merits. Without a statement of reasons, the actual reason for denial can only be assumed, but not actually known. The Attorney General here does exactly tha which this Court disapproved in Harris v. Reed. The Attorney General presumes the reason for denial and asks this Court to accept its presumption.

The California Attorney General incorrectly asserts that the California Supreme Court twice denied Mr. Nunnemaker's habeas corpus petitions on the ground of procedural default. In fact, there is no indication whatsoever of unambiguous reliance upon a procedural default as a basis for the disposition in the state high court of either original petition for habeas relief.

The first petition was denied with citations to In re Swain, supra, 34 Cal.2d at 300, and In re Waltreus, supra, 62 Cal.2d 218. (See Appendix D, Petition for Writ of Certiorari.) Swain holds that in a habeas petition in the state court, a defendant is required to "allege with particularity the facts upon which he would have a final judgment overturned and that he fully disclose his reasons for delaying in the presentation of those facts." Id. at 304. Waltreus holds that arguments rejected on appeal

will not be reviewed again in habeas. As the District Court for Northern California stated, "[t]hese citations are cryptic." Nunnemaker v. Ylst, 904 F.2d 473, 474 n.2 (9th Cir. 1990).

The California Supreme Court denied the second petition for writ of habeas corpus with no comment or citation at all. Because there is no clear and express statement as to the reason for denial of the second petition, the Attorney General can only presume the reason for denial. There is nothing in the rules of practice governing state habeas corpus procedure that could lead to the statement that Mr. Nunnemaker's petition was denied in fact for the reasons presumed by the Attorney General.

The Ninth Circuit's opinion in this case is not in conflict with other cases construing Harris v. Reed. The Fifth Circuit, applying Harris in Booker v. Lynaugh, 872 F.2d 100 (5th Cir. 1989), held that the district court was not precluded by procedural bar from reviewing a state prisoner's claims where the last state court to render judgment denied an application for habeas relief without opinion on a form order that stated, "Application denied without written order." Id. at 100. In Harman v. Burton, 894 F.2d 1268 (11th Cir. 1990), the Eleventh Circuit dealt with a state per curiam affirmance without a written opinion. The Eleventh Circuit found that a per curiam affirmance creates no ambiguity. They reasoned that an affirmance, by definition, clearly states that a lower court made a correct decision. Ellis v. Lynaugh, 873 F.2d 830 (5th Cir. 1989), also deals with an affirmance of a lower court's order.

Id. at 838. In Arce v. Smith, 889 F.2d 1271 (2d Cir. 1989), the last state court clearly and expressly stated that the reason for denial of relief was procedural default. Thus, the mandate of Harris was met.

In Russell v. Lynaugh, 892 F.2d 1205 (5th Cir. 1989), the Fifth Circuit, in concluding that the issue was barred from review by procedural default, expressly relied on the fact that on each occasion that the issue was presented to the state court, the procedural bar was applied. Id. at 1210. In the instant case, a different situation exists in that on each occasion that the issue was presented to the state high court, procedural bar was not unambiguously applied. As noted previously, the first original petition filed by Mr. Nunnemaker in the California Supreme Court was denied with citations to cases not necessarily dealing with procedural default.

The Ninth Circuit Court of Appeal's opinion on this case has not "furnished state prisoners with a blueprint for circumventing state procedural rules and forum shopping on federal issues." (Petition, pp. 1-12.) There is no reason why petitions for a writ of habeas corpus filed in state courts would predictably be denied without comment as asserted by the Attorney General. Presumably, the state courts read each petition for relief filed with them and make a decision as to whether each petition should or should not be granted. As stated by this Court in Harris v. Reed, supra, "a state court that wishes to rely on a procedural bar rule in a one-line pro forma order easily can write that

relief is denied for reasons of a procedural default." (Id. at 1044 n.12.)

"[T]he federal courts . . . have a primary obligation to protect the rights of the individual that are embodied in the Federal Constitution." Harris v. Reed, 109 S. Ct. at 1045 (Stevens, J. concurring). Habeas review should not be denied arbitrarily.

This Court has given the states an eminently clear and direct way to assert procedural default if it wishes to do so. In rendering its opinion on this case, the Ninth Circuit simply followed the precedent of Harris v. Reed. The opinion in this case is consistent with the holdings of this Court. (See, e.g., Harris v. Reed, supra, ___ U.S. ___, 109 S. Ct. 1038; Caldwell v. Mississippi, 472 U.S. 320 (1985); Michigan v. Long, supra, 463 U.S. 1032. There is no conflict with the law. Thus, this case does not qualify for review by this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

DATED: September 28, 1990.

JULIANA DROUS
Attorney for Respondent

CERTIFICATE OF SERVICE

Undersigned declares under penalty of perjury:

I am a citizen of the United States, over the age of eighteen, and not a party to the within action. My business address is 214 Duboce Avenue, San Francisco, California, 94103. On September 29, 1990, I served the foregoing RESPONDENT'S BRIEF IN OPPOSITION by placing in a sealed envelope with prepaid postage thereon, in the United States Mail, in San Francisco, California, and addressed as follows:

Ronald E. Niver
Supervising Deputy Attorney General
455 Golden Gate Avenue, Room 6200
San Francisco, CA 94102

Executed September 29, 1990, at San Francisco, California.

JULIANA DROUS

Supreme Court, U.S.
FILED
DEC 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-68

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

EDDIE S. YLST, WARDEN

Petitioner,

v.

OWEN DUANE NUNNEMAKER

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed July 9, 1990
Certiorari Granted November 5, 1990

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RELEVANT DOCKET ENTRIES

DATE	DOCKET ENTRIES
March 15, 1976	Respondent sentenced to life imprisonment for first degree murder
June 30, 1978	California Court of Appeal affirmed the judgment of conviction (as modified)
September 27, 1978	California Supreme Court denies petition for hearing
December 3, 1986	California Supreme Court denies petition for writ of habeas corpus
September 8, 1987	United States District Court dismisses petition for writ of habeas corpus
December 8, 1987	United States District Court dismisses petition for writ of habeas corpus
April 7, 1988	California Supreme Court denies petition for writ of habeas corpus
December 9, 1988	United States District Court denies petition for writ of habeas corpus

DATE	DOCKET ENTRIES
May 25, 1990	United States Court of Appeals affirms in part and reverses in part the judgment of the District Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, vs. OWEN DUANE NUNNEMAKER, Defendant and Appellant.	1 Criminal 15379 (Super. Ct No. 7869-C)

Defendant, Owen Duane Nunnemaker, was tried by a jury on an information charging him with the murder of his wife, Alice (count one); assault with a deadly weapon (Pen. Code, § 245, subd. (a)) (count two), and a violation of former Penal Code sections 12022.5 (use of a firearm), 3024, subdivision (a), and 12022 (armed with a deadly weapon).[1/] The jury returned a guilty

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1. Section 3024 was repealed by statutes of 1976, chapter 1139, section 279; sections 12022 and 12022.5 were amended by statutes of 1976, chapter 1139, sections 304-305, and by statutes of 1977, chapter 1. 5,

BEST AVAILABLE COP

verdict of first-degree murder (Pen. Code, § 187), and found that the enhancement allegations were true.[2/] On appeal from the judgment entered on the verdict, defendant raises several claims of errors. We have examined the entire cause, including the evidence, and determine that only one of his claims is meritorious; accordingly, we modify the judgment of conviction and - as so modified - affirm the judgment. We discuss each claim ad seriatim.

Facts

In the afternoon of May 31, 1975, defendant - armed with an automatic weapon - forcibly entered the home of his estranged wife, Alice, and following a struggle fired a single shot from a distance of three feet mortally wounding the victim. As witnesses to the shooting attempted to assist the fallen victim, the defendant restrained them from summoning aid and cut the telephone cord preventing its use to call an

---

sections 91-92.

2. A not guilty verdict was returned on count two.

ambulance. One of the foster children,[3/] Linda (age 16 years), managed to exit the home and called the sheriff's office on a neighbor's telephone. When the officers arrived, Linda informed them of the shooting. After all but one of the children had exited, the officers entered the home and observed the victim lying on the floor of the living room and another foster child, Sherry (age 17 years), at her side. During their search, they discovered the defendant in a rear bedroom where apparently he had just telephoned the sheriff's office requesting an ambulance. Defendant offered no resistance and was placed under arrest and searched; several rounds of 9 millimeter ammunition were found in defendant's pocket; defendant led the officers to his car parked in

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3. For several years defendant and his wife had maintained their Sebastopol family residence as a licensed foster child placement facility. On the day of the shooting, four foster children (ranging in age from 7 to 17 years), the three pre-teenage Nunnemaker children, and a family friend, Mrs. Mickey Brower and her son, were present in the Nunnemaker residence. Mr. Adrian Turner, a foster child counselor, also resided there but was not present.

front of the house where they observed the weapon used[4/] lying on the front seat.

At trial, Linda, Sherry, and Mrs. Brower testified that the defendant appeared sober and calm immediately after the shooting; the three arresting officers gave similar testimony concerning their observations of defendant at the time of his arrest.

The defendant testified that he went to the home for the purpose of delivering a birthday present and to visit his children, which permission was refused by the victim. That as he and the victim were standing at the door, the victim suddenly "launched herself toward me." Thereafter, he could not recall any of the ensuing events until he walked to his car with his son Shawn and gave him the birthday present; he then noticed he was holding a gun in his hand which he placed in his car. Upon reentering the house, and thereafter seeing his

---

4. It was stipulated at trial that the 9 millimeter German Luger pistol, retrieved from defendant's automobile in the course of a warranted search, was the actual death weapon.

wife lying on the floor, he telephoned the sheriff's office from the rear bedroom. Defendant denied that he had intentionally shot his wife whom he loved deeply.

The defense introduced psychiatric testimony in support of a diminished capacity defense; on rebuttal, the prosecution presented conflicting psychiatric testimony.

I. Insufficiency of the Evidence

Defendant contends that there was no substantial evidence presented during trial to support the jury's implied finding of premeditation, deliberation and willfulness, or malice, warranting at a minimum that the judgment be modified to a lesser conviction or degree of crime (Pen. Code, § 1181, subd. 6). Relying on a series of decisions where such remedial procedure was invoked (People v. Bassett (1968) 69 Cal.2d 122; People v. Anderson (1968) 70 Cal.2d 15; and People v. Wolff (1964) 61 Cal.2d 795) defendant argues that in light of the whole record there was no reasonable, credible and solid evidence presented to justify the jury's implied

findings of the requisite mental states. Additionally, focusing on certain evidence introduced by the prosecution, he argues that the permissible inference of innocence based upon such evidence is binding upon the People as establishing a reasonable hypothesis of innocence of first-degree murder. (See People v. Estrada (1923) 60 Cal.App. 477.)[5] Our review of the whole record and the evidence adduced leads to our conclusion that defendant's contentions have no merit.

Malice is express when there is manifested a deliberate intention unlawfully to kill a human being (People v. Wolff, supra, 61 Cal.2d 795, 819-820; Pen. Code, § 188) and implied where "'the killing proximately resulted from an act, the natural consequences of which are dangerous to life, which act was deliberately

5. His principal reliance is placed upon evidence of defendant's intoxication when he made certain damaging admissions both before and at the time of the shooting, the evidence surrounding the struggle between defendant and the victim immediately before the shooting, the defective safety mechanism on the death weapon, and observations by an independent witness that defendant had acted "crazy" earlier that morning.

performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.'" (People v. Mattison (1971) 4 Cal.3d 177, 182-183; People v. Phillips (1966) 64 Cal.2d 574, 587.) Malice will be presumed when it is proven that the killing was committed by the defendant and nothing more need be shown. (People v. Conley (1966) 64 Cal.2d 310, 320.) Viewing the record in a light favorable to the People (People v. Reilly (1970) 3 Cal.3d 421, 425), the evidence that defendant went to the victim's home where - following a struggle - he forcibly gained entrance, thereafter pulled out the weapon and from a distance of a few feet, took deliberate aim and shot the victim, is not only sufficient to support a presumption of malice but is also sufficient to support an inference of express malice. (People v. Williams (1969) 71 Cal.2d 614, 624.)

Defendant argues that the psychiatric testimony produced in his behalf constituted substantial evidence negating his ability to harbor malice; additionally, that

the conflicting psychiatric testimony produced by the prosection was legally insubstantial and thus a conviction of murder on such evidence cannot be sustained. Defendant is mistaken. It is well established that "'"[i]f the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.'" [Citations.] The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, . . . [and] [t]he appellate court must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt. [Citations.]" (People v. Reilly, supra, 3 Cal.3d 421, 425.) And, under certain circumstances, the jury may even properly reject uncontradicted psychiatric testimony. (People v. Coogler (1969) 71 Cal.2d 153, 166 [cert. den. 405 U.S. 971].) "'The chief value of an expert's testimony in this [mental illness] field, as in all other

fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion; . . .' [Citation.]" (People v. Bassett, supra, 69 Cal.2d 122, 141.) Herein, while defendant's expert testified that the defendant had acted without malice, he also conceded the possibility that the defendant intended to kill his wife. Moreover, the prosecution's expert who had conducted an independent examination of the defendant (cf. People v. Bassett, supra, where the prosecution's psychiatric testimony was based upon hypothetical questions alone) found similar psychiatric symptoms which in his opinion did not evidence a mental illness of such a serious nature as to preclude the ability to form the requisite state of malice. Such evidence, substantial in nature, was sufficient to support the jury's implied finding of malice which must be accepted on appeal. (People v. Reilly, supra, 3 Cal.3d 421; People v. Redmond (1969) 71 Cal.2d 745; see also People v. Anderson, supra, 70 Cal.2d 15; People v. Bassett, supra, at p. 139.) Nor is a

contrary conclusion compelled by reason of the conflicting testimony given by Linda and Sherry as to whether the fatal shot occurred accidentally during the struggle or as a result of a deliberate act following that initial altercation, since it is for the jury in the final analysis to determine the effect and value of the evidence, including impeachment. (See Evid. Code, §§ 312, 780; People v. Muir (1966) 244 Cal.App.2d 598, 601.) Accordingly, we find defendant's contention to be without merit.

Defendant further contends that the record is barren of any solid evidence to support the finding of premeditation, deliberation and willfulness necessary to sustain a first-degree murder conviction. With emphasis on the language of our Supreme Court in People v. Anderson, supra, 70 Cal.2d 15, he argues none of the evidence falls within any of the three classifications identified in Anderson essential to support an inference of the necessary mental states underlying a first-degree

murder conviction. For the reasons which follow, we find this contention likewise unpersuasive.

As correctly stated by the People, the controlling test is "the ability of the defendant to maturely and meaningfully contemplate the gravity of his intended act." (People v. Sedeno (1974) 10 Cal.3d 703, 713.) While the statutory definition requires "'substantially more reflection than may be involved in the mere formation of a specific intent to kill . . . [¶] [t]he true test is not the duration of time as much as it is the extent of the reflection.'" (People v. Wolff, supra, 61 Cal.2d 795, 821.) In People v. Anderson, supra, 70 Cal.2d 15, the Supreme Court delineated three types of evidence which, singly or collectively, are necessary to sustain a finding of premeditation and deliberation: (1) planning activity directed to and explainable as intended to result in the killing; (2) prior relationship and/or conduct supporting an inference of evil motive; (3) and the manner of killing itself. Unlike the factual circumstances reflected in the cases reviewed in

Anderson, the record herein demonstrates sufficient evidence of premeditation and deliberation under any of the Anderson topologies. Prior to the actual killing defendant armed himself with a pistol and extra ammunition, openly stated he was going to put "a couple more notches" on his pistol, proceeded to his wife's residence where he forcibly gained entrance after a brief struggle and then delivered the fatal shot at pointblank range. Such evidence amply supports an inference that he had soberly reflected upon his contemplated act and formed an intent to kill his wife well before he arrived at her residence. The forcible entry and deliberate discharge of his pistol may be readily reconciled with a theory of a preconceived plan consummated after mature reflection. (Cf. People v. Hillery (1965) 62 Cal. 2d 692 [cert. den. 386 U.S. 938; rehg. den. 386 U.S. 1000]; People v. Kemp (1961) 55 Cal.2d 458 [cert. den. 368 U.S. 932].) The evidence of motive tending to establish preexisting reflection (Anderson at p. 27) was even more compelling; not only

was it established that defendant had sometime earlier threatened to "blow her [his wife's] head off with a shotgun," but at the time of the killing the separation and pending divorce had deprived him of a substantial part of his income as well as access to his children. Moreover, his stated belief that his wife was engaged in a meretricious relationship with Turner contradicted his professed affection towards her from which the jury could reasonably conclude that defendant, angered and embittered, was motivated to deliberately and intentionally kill his wife. The act of intentionally firing the pistol from close range into the victim's chest strongly supports an inference of premeditation. Unlike People v. Anderson, supra, 70 Cal.2d 15, 21 (involving multiple random stabbing upon the victim's body), the evidence here disclosed a single, well-placed lethal shot fired from a distance of approximately three feet. (Cf. People v. Hillery, supra, 62 Cal.2d 692.) Although testimony was presented supporting defendant's version of an accidental shooting during the struggle (including

evidence of the defective safety mechanism on the Luger), such conflicting evidence related to a disputed question of fact for resolution by the jury. Clearly, the jury rejected a theory of accidental shooting in concluding that the killing was intentional. Where, as here, that determination is based upon substantial evidence, the jury's finding may not be disturbed. (People v. Reilly, supra, 3 Cal.3d 421; People v. Redmond, supra, 71 Cal.2d 745.)

Our review of the whole record reveals an aggregate of substantial evidence more than adequate to support an inference that the defendant was mentally capable to meaningfully reflect upon the gravity of his act and upon which the jury could reasonably base its implied findings of willfulness, premeditation, deliberation, and malice. (See People v. Anderson, supra, 70 Cal.2d 15.) Such findings must be accepted on appeal. (People v. Reilly, supra, 3 Cal.3d 421; People v. Redmond, supra, 71 Cal.2d 745.)

II. Miranda Error

Defendant further contends that prejudicial error was committed in allowing the testimony of the prosecution psychiatrist, Dr. Lowe, because he had not been advised of his Miranda rights (Miranda v. Arizona (1966) 384 U.S. 436) prior to the psychiatric interview; in addition, that the failure of his trial counsel to object to such testimony on Miranda grounds should not be considered on the issue of waiver. Defendant's contentions have no merit.

While it is generally established that Miranda principles apply to custodial interrogation of a defendant by a prosecution psychiatrist (People v. Bennett (1976) 58 Cal.App.3d 230, 236-237 and fn. 3) an objection based upon a Miranda violation cannot be raised for the first time on appeal. (People v. Bennett (1976) 60 Cal.App.3d 112, 116; In re Dennis M. (1969) 70 Cal.2d 444, 461-462.) Although the record is silent as to whether defendant was timely advised of such rights, the failure to interpose an objection during trial precludes

our consideration on appeal. (People v. Bennett, supra, 60 Cal.App.3d 112, 116-117.)

Inferentially, defendant claims that the failure of his trial counsel to object effectively deprived him of a meaningful defense of diminished capacity in that the introduction of the prosecutor's psychiatric testimony conflicted with that of the defense. His argument is unsound. In order to successfully assert a claim of ineffective counsel, defendant has the burden of establishing such incompetence. (People v. Camden (1976) 16 Cal.3d 808, 816-817; People v. Martinez (1975) 14 Cal.3d 533, 538) as demonstrable reality (People v. Stephenson (1974) 10 Cal.3d 652, 661.) Under such governing principles, the record must establish that counsel was either ignorant of the facts or the law resulting in a withdrawal of a crucial defense that reduced the trial to a farce and a sham. (People v. Martinez, supra, at p. 538.) Absence such affirmative showing, defendant is entitled to no relief. (People v. Jenkins (1975) 13 Cal.3d 749, 754-755 [cert. den. 423

U.S. 860].) Defendant has failed to make the requisite showing. Moreover, we cannot say that counsel's failure to object was not motivated by reasons of trial strategy or tactics. Defense counsel could readily have concluded that a tactical advantage could be gained through cross-examination of the expert witness revealing bias, the limited basis of his opinion and forensic experience in homicide cases. Failure to such assumed tactics does not demonstrate ineffectiveness and a party may not be permitted ""to gamble on a favorable decision and then raise such an objection in the event he is disappointed in the result.'" [Citation.]" (People v. Tappan (1968) 266 Cal.App.2d 812, 817.) Similarly, we see no merit in defendant's disjointed claim of involuntariness of his statements during the questioned psychiatric interview, in the absence of any objection based upon such grounds. Defendant fails to direct our attention to the relevant portion of the record (see Cal. Rules of Court, rule 15(a)), nor has our

examination thereof disclosed such an objection. We find no error herein.

III. Prosecutorial Misconduct

Defendant further complains of prejudicial misconduct committed by the prosecutor and his "advocate" in engaging in a "McCarthy-type" attach maligning his character and motives in order to depict him as a "bad guy" in the eyes of the jury. We have examined each of these claims and find them to be without merit.

To sustain a charge of misconduct it must be unequivocally demonstrated that the conduct involved a dishonest act or an attempt to persuade the court or jury by use of deceptive or reprehensible methods. (People v. Strickland (1974) 11 Cal.3d 946, 955; People v. Beivelman (1968) 70 Cal.2d 60, 75 [cert. den. 406 U.S. 971].) We first observe that none of the claimed acts of misconduct were objected to at trial; generally, a failure to raise such timely objection forecloses consideration of such misconduct on appeal. (See

People v. Jenkins (1974) 40 Cal.App.3d 1054, 1057; People v. Asta (1967) 251 Cal.App.2d 64, 87; and People v. Ney (1965) 238 Cal.App.2d 785, 790.) The record demonstrates that, with one exception (a leading question), defendant both failed to object to the cited instances or request an assignment of misconduct or curative admonition. Nonetheless, defendant urges that his failure to object may be excused when the case is "closely balanced . . . [and] the misconduct contributed materially to the verdict or unless the harmful results . . . could not have been obviated by a timely admonition to the jury." (People v. Varnum (1969) 70 Cal.2d 480, 488 [cert. den. 406 U.S. 971]; People v. Ney, supra, at p. 790.) The record does not support defendant's assertion in order to base a claim of waiver. The questioned conduct related to certain statements made by the prosecutor during opening statement and closing argument in which the defendant was characterized as a lazy inebriated who enslaved his wife to his every bidding, and that he had stated during the telephone

call to the sheriff's office that he had shot his wife. The prosecutor's statements reflecting upon defendant personally were clearly relevant to the issue of motive on the part of the defendant. (See People v. Clifton (1967) 248 Cal.App.2d 126, 133.) While the tape recording of the subject telephone call indicates that defendant did not make the statement attributed, the actual tape recording was played before the jury several times so that they could not possibly have been misled by the prosecutor's mistaken recollection of the substance of that call; indeed, the defendant himself testified that he believed he had made that admission on that occasion. In any event, there was independent evidence that defendant did shoot his wife. The testimony[6/] by Dr. Lowe (characterized as the

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6. - The actual testimony complained of, as underscored, is reported as follows:
"Q [By defense counsel] I will rephrase it.
"A Taking that into consideration --
"Q I mean taking all of those things that he is an intelligent man and all of the other things into consideration, you wouldn't expect a man of his intelligence, that everybody has testified to, to go over there with the intent to kill his wife, would you?

prosecutor's "advocate"), elicited in response to defense counsel's question, was relevant for the limited purpose of establishing matters upon which he relied in forming his expert opinion. (See Evidence Code, section 801. subd. (b); Witkin, Cal. Evidence (2d ed. 1966) section 410, p. 368.) No "misconduct" by the witness is manifested. Defendant's remaining claim of "unethical conduct," unsupported by the record, is determined to be groundless.

IV. Jury Instructions

Defendant next contends that the jury instructions on intoxication as related to the defense of diminished capacity were incomplete and failed to adequately

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"A <u>There is some evidence that I don't know whether it has been introduced into court or not, into this trial, that indicated at one point that he said, you know, if she leaves me, I will.</u>
"Q No, that's not been in here, no, no.
"A No. Okay, okay, that's --
"Q That's why Mr. Gallagher [the prosecutor] didn't bring it in. Taking those things into consideration, you wouldn't expect him to go over there with the intent to kill, would you?
"A I don't know. I cannot say.

distinguish the significance of evidence of voluntary intoxication bearing upon that defense from that involved in the general intent crime charged in count two. Our examination of the challenged instructions reveals the contention to be specious. The jury was properly instructed on all of the essential elements of the murder charge and on the effect of intoxication relevant to the defense of diminished capacity and the lesser included offenses of voluntary and involuntary manslaughter.[7] Moreover, in giving CALJIC instruction No. 4.20 (voluntary intoxication not a defense to a general intent crime) the court expressly limited that instruction to the aggravated assault charge contained in count two, of which defendant was ultimately acquitted. Defendant's companion argument that the court was obliged to give a "particularized" instruction regarding the defendant's level of intoxication is unsound. Since the court gave the required instructions concerning

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7. - The instructions given included standard CALJIC Instructions Nos. 4.21, 4.30, 8.41, 8.47 and 8.77 (CALJIC 3d ed.).

circumstantial evidence (CALJIC Nos. 2.00-2.02 (CALJIC 3d ed.)), as conceded by defendant, no further instructions were required or appropriate, particularly in the absence of any request by the defendant. (See generally People v. Rocha (1978) 80 Cal.App.3d 972, 980, and authorities there collected.) We find no error here.

V. Enhanced Punishment

Relying on People v. Bennett, supra 60 Cal.App.3d 112, defendant argues that the enhanced punishment based upon the jury findings made under the provisions of Penal Code section 3024, subdivision (a), and 12022 may not stand.

Our Supreme Court held in People v. Walker (1976) 18 Cal.ed 232, 243-244, that a finding pursuant to Penal Code section 12022.5, is of no legal effect in a case involving a sentence of life imprisonment upon conviction of the basic crime in which a firearm was used. "Defendant would thereby be sentenced to life imprisonment plus a consecutive term of five years to

life, providing a prison sentence theoretically extending beyond death." (P. 243.) The facts of the case at bench fall squarely within the prohibition of Walker; accordingly, any additional punishment imposed pursuant to said finding is invalid and must be stricken. Similarly, the punishment pursuant to Penal Code section 12022 can have no effect since it, too, would subject defendant to prison sentence beyond death.[8/] The enhancement imposed pursuant to section 12022 must also be stricken.[9/]

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8. - The language and legislative intent of former section 12022 are substantially similar to those of section 12022.5 in providing for an additional punishment of at least five years' imprisonment. (See People v. Walker, supra, 18 Cal.3d 232, 241; People v. Chambers (1972) 7 Cal.3d 666, 671-672.)

9. - We recognize that former section 3024, subdivision (a), imposed a minimum term of imprisonment of two years. Since defendant is already subject to a minimum term of incarceration of seven years based on his life sentence (Pen. Code § 3046), the finding under section 3024, subd. (a), can serve no purpose for enhanced punishment. However, we note that the finding that defendant was armed at the time of the offense could have some future consequence. (See, e.g., Pen. Code, § 1203.06, subdivision (a)(1).) Therefore, we decline to strike the finding that

The superior court will modify the judgment, and abstract of judgment and commitment to state prison, by striking therefrom the punishment imposed pursuant to Penal Code sections 12022 and 12022.5; as so modified, the judgment is affirmed.

Racanelli, P.J.

WE CONCUR:

Elkington, J.

Low, J.[**********/]

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defendant was armed within the meaning of section 3024, subdivision (a).

**********. Assigned by the Chairperson of the Judicial Council.

CLERK'S OFFICE. SUPREME COURT
4250 STATE BUILDING

San Francisco, California 94102
SEPTEMBER 27, 1978

I have this day filed Order

HEARING DENIED

In re: 1 Crim. *No.* 15379

People

vs.

Nunnemaker

Respectfully

G.E. Bishel
Clerk

SUPREME COURT COPY

CRIM. 25449
Supreme Court Filed: May 22, 1986
Laurence P. Gill, Clerk

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

PETITION FOR WRIT OF HABEAS

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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

OWEN DUANE (NUNNEMAKER)

Petitioner,

-vs-

SUPERIOR COURT OF THE
COUNTY OF SONOMA AND
THE CALIFORNIA DEPARTMENT
OF CORRECTIONS,

Respondent, Case No. _____

_____/

THE PEOPLE OF THE STATE
OF CALIFORNIA

Real Party in Interest.

_____/

PETITION FOR WRIT OF HABEAS CORPUS

Owen Duane Nunnemaker
B-72101
P.O. Box 2000 H-149
Vacaville, California 95696

IN THE SUPREME COURT

IN AND FOR THE STATE OF CALIFORNIA

IN THE MATTER OF:	
OWEN DUANE NUNNEMAKER,	Case No. _____
Petitioner,	(Sonoma County Case No. 7869-C)
ON HABEAS CORPUS.	

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE ROSE BIRD, CHIEF JUSTICE AND ALL ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT, THIS PETITION OF OWEN DUANE NUNNEMAKER, RESPECTFULLY ALLEGES:

STATEMENT OF THE CASE

By an information filed August 21, 1975, petitioner was charged with murder, in violation of Penal Code, section 187, and assault with a deadly weapon, in violation of Penal Code, section 245(a). It was further alleged that during the (commission) of the aforementioned offense, petitioner was armed with and

did use a firearm, in violation of Penal Code, section 12022 and 12022.5 (CT 12-13).[1]

The matter was placed before a trial by jury on the 13th of January, 1976 (CT 43). There is still an unanswered question as to proper arraignment, in that petitioner was held beyond 48 hours in violation of Penal Code, section 825.

On the 30th day of January, 1976, the jury returned guilty verdicts on first degree murder in violation of Penal Code, section 187. In addition, the jury found that petitioner was armed with and did use a deadly weapon, in violation of Penal Code, section 12022 and 12022.5. As to the charge of assault with a deadly weapon in violation of Penal Code, section 245(a), petitioner was found not guilty. (CT 61.)

On March 15, 1976, petitioner was sentenced to State Prison for a term of Life, plus enhancements.

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1. Herein the words Reporters Transcripts will be cited at "RT"; with the words Clerk Transcript cited as "CT".

A timely notice of appeal was filed on March 23, 1976. With the conviction being affirmed in part on June 30, 1978. The Appellate Court cited People-vs-Bennett, supra 60 Cal.App.3d 112 and People-vs-Walker (1976) 18 Cal.3d 232, 243-244, stating that a finding pursuant to Penal Code, section 12022 and 12022.5 must be stricken.

A timely notice of appeal was filed on March 23, 1976. With the conviction being affirmed in part on June 30, 1978. The Appellate Court cited People-vs-Bennett, supra 60 Cal.App.3d 112 and People-vs-Walker (1976) 18 Cal.3d 232, 243-244, stating that a finding pursuant to Penal Code, section 12022 and 12022.5 must be stricken.

The First Appellate Division stated that except for the modification (the removal of the enhancements) the conviction was affirmed.

STATEMENT OF FACTS

On May 31, 1975, it is alleged that petitioner shot his wife to death. It was learned that Mr. Nunnemaker

and his wife Alice maintained a home for foster children on Bloomfield Road in Sebastopol, California. At the time of the alleged shooting there were four children in the home, ranging from seven to seventeen and the Nunnemaker's own three children, who were three, four and six years of age (I RT 9-14.)[2/]

It was adduced that Mrs. Nunnemaker left the house with the children to assist a Mrs. Brower in a change of residence (I RT 28-30; II RT 13-18). There was testimony that indicated once Mrs. Nunnemaker returned home that she and Mr. Nunnemaker engaged in an argument that lasted six hours and ended when Mr. Nunnemaker fell asleep (I RT 31-32; II RT 18-21, 163-76).

As a result of this argument, Mrs. Nunnemaker took the children from the house and went to her

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2. The four volumes containing the testimony adduced at trial are not found to be consecutively paginated. Therefore, the transcripts of the proceedings of January 19 and 26, 1976 is designated "I RT"; the two transcripts of January 20-22 and 29, 1976 are designated "II RT" and "III RT"; the transcript of January 27, 1976 is designated "IV RT."

mother's residence in Ukiah for the next two days (I RT 33; II RT 20-22). Petitioner was not home when they returned to their home (II RT 22). Mrs. Nunnemaker made the decision that perhaps they should end their marriage and stated that she was going to begin divorce proceeding (I RT 166; III RT 377-78).

Petitioner left the home on Bloomfield Road and returned often to visit the children. During this time, Adrian Turner moved into the home on Bloomfield Road to serve as a counselor for the foster children (I RT 35; II RT 169-70).

On the afternoon on May 31, 1975, petitioner drove to the family home. In the house when he arrived were Mrs. Nunnemaker, their children, Shawn, Victor, and Vandy; also present were the foster children, Linda Rivera, Sherry Thomas, Raymond Mead and Dornie Schultz and Mickey Brower and her son (I RT 41; II RT 26). Sherry heard the doorbell ring and saw Mrs. Nunnemaker go to the door. Sherry testified that she

heard Mrs. Nunnemaker say, "Please leave Slim" (I RT 43-44). [Slim was a nickname of petitioner (I RT 9).]

Mr. and Mrs. Nunnemaker left the doorway and entered the living room. There was testimony that a struggle took place. It was also adduced that Mr. Nunnemaker said, "you won't let me see my kids." (I RT 45.)

A weapon was then seen. A single shot was discharged and Mrs. Nunnemaker fell to the floor. (I RT 51.)

DEFENSE

Petitioner set forth to establish that there was neither malice or premeditation in the shooting death of his wife. He testified that in 1964 he injured his back in a fall from a ladder and underwent surgery to repair a ruptured disc. As a result of the injury, he was unable to work. He was under constant pain and disliked the medicines prescribed because they often left him intoxicated and unable to perform simple tasks.

Petitioner's disability did not prevent his speculation in the stock market, an enterprise at which he was successful (I RT 151; IV RT 82). Since the opening of the "home" for the emotionally disturbed children, which he and Mrs. Nunnemaker agreed together to operate, the couple purchased a home and obtained the necessary license. Still disabled, petitioner did light maintenance work and watched the children when Mrs. Nunnemaker was not at home. (1 RT 147-50). Additionally, he took the children on trips which he tried to make educational as well as entertaining. (I Rt 155-A).

It should be noted that Mr. and Mrs. Nunnemaker had been married for thirteen years. There was testimony that the Nunnemaker house was a happy family (IV RT 5-10). Though for reasons unknown Mrs. Nunnemaker had stayed out all night with Mickey Brower under the pretense of assisting in moving Mickey Brower.

Petitioner's last recollection of the evening in which Mrs. Nunnemaker stayed out was when she came in at 6:00 A.M. (I RT 165). He did not recall any argument with his wife (I RT 207).

After petitioner was [served] with notice of dissolution proceeding (approximately ten days after the alleged argument about Mrs. Nunnemaker staying out all night with the children) Mr. Nunnemaker attempted to effect a reconciliation, but Mrs. Nunnemaker rebuffed his efforts (I RT 166, IV RT 37).

Mrs. Nunnemaker's efforts to hurt Mr. Nunnemaker emotionally are evidenced by she requesting that he not visit his children in the home but rather in a nearby park stating that she did not want him in her house (I RT 167).

Testimony revealed that petitioner had begun to suffer both physically and emotionally. He had lost weight and became very forgetful (I RT 170, 175; IV RT 13, 21-22, 31, 37-38,42). Wallace feared that Mr. Nunnemaker was on the [verge] of a nervous breakdown

(IV RT 19-20). So is [sic] was established that Mr. Nunnemaker actions and attitude suggested the presence of a prominent psychiatric disorder were detectable.

On the day of May 31, 1975, Mr. Nunnemaker testified that he did not remember carrying a weapon. He went to the family house to deliver a gift for his son. When he got to the house, his wife refused to let him in to see any of his children stating that he should have called first (I RT 181, 225). Mr. Nunnemaker remembers Mickey Brower, who appeared to be maneuvering to get behind him, while at the same time he saw Adrian Turner in the hallway in his general direction (I RT 182). Mr. Nunnemaker also testified that his wife launched herself at him. (I RT 229).

Petitioner's next recollection was that his son Shawn was sitting on his lap. He then went to the car to obtain the gift that he had brought. That was the first time that he noticed he had a gun in his hand. He placed the gun in the car and returned to the house. Upon returning to the house, he noticed that his wife

was lying on the floor. He then telephoned the sheriff's department (I RT 182-83).

At trial petitioner testified that he did not remember drinking that morning, carrying a gun to his family home, shooting his wife, cutting a phone cord or the alleged struggled that was to have taken place in the living room (I RT 178, 183, 223, 225, 231-32). He testified that he loved his wife and did not intend to shoot her. (I RT 183).

Psychiatrist Martin Blinder testified that he examined petitioner on July 24, 1975 and again on January 8, 1976 and subsequently reviewed the files and records relating to the psychiatric condition of petitioner (III RT 402-03). He further testified that the injury to petitioner's back caused him much pain which he attempted to dull with alcohol. As a result, liquor became a crutch (III RT 405). His wife's ultimate rejection and the realization that reconciliation was impossible left petitioner emotionally and mentally devastated (III RT 408). It was adduced at trial that

petitioner suffered a psychotic depression, the symptoms of which include weight loss, insomnia, loss of energy and sexual interest, fatigue, and a slowing of mental processes (III RT 408).

After thirteen years of marriage, three children, four foster children, and a serious back injury, in the spring of 1975, petitioner found himself with no home, no job, no wife and no children. Having given up the drinking, he had no alcoholic crutch on which to lean. (III RT 412).

Doctor Blinder concluded that petitioner's adverse circumstances exacerbated his emotional problem and produced a disassociative reaction on the day he killed his wife. Petitioner's "cognitive, rational, controlling, judgmental, cerebral functions were rendered partially inoperative and subordinate to impulsive, emotional acts" (III RT 419).

Further, Doctor Blinder was of the opinion that the mental disorder from which petitioner suffered affected his ability to deliberate and premeditate (III RT 419-

20). In short, Doctor Blinder testified that it was possible, although not probable that petitioner premeditated the death of his wife (III RT 463).

There was a rebuttal offered by prosecution. A Psychiatrist by the name of Stephen Lowe testified against petitioner.

Dated: May 16, 1986

Respectfully submitted,

Original signed

OWEN (DUANE) NUNNEMAKER
In Pro Per

DECLARATION

Comes now, Owen Duane Nunnemaker, the petitioner in the enclosed Petition for Writ of Habeas Corpus and states under penalty of (perjury) that all of the statements made are true and correct to the best of his knowledge. To those things stated from memory, I believe them to be true and correct.

Further, that I am incarcerated at the California Medical Facility, Vacaville, California. That I am

without funds to employ an attorney, but believe I am entitled to the redress herein sought.

Executed this 16 day of May, 1986 at the California Medical Facility, Vacaville, California.

Original signed
OWEN DUANE NUNNEMAKER

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

In the matter of:

OWEN DUANE NUNNEMAKER,

Petitioner, CASE NO.

ON HABEAS CORPUS.

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Owen Duane Nunnemaker, hereby petitions this Court for a writ of habeas corpus and by this petition, alleges the following:

I

Petitioner, Owen Duane Nunnemaker, is incarcerated and restrained of his liberty at the California Medical Facility, a California State Prison, located at Vacaville, California. This incarceration is pursuant to a judgment pronounced by the Superior Court, in the county of Sonoma on the 15th day of March 1976. (Case No. 7869-C; Appellate No. 1 Crim. 15379)

II

In an unpublished opinion, filed June 30, 1978, Petitioner's conviction was affirmed in part. The Appellate Court stated as follows:

> "The Superior Court will modify the judgment and abstract of judgment and commitment to state prison, by striking therefrom the punishment imposed pursuant to Penal Code, sections 12022 and 12022.5; so as modified the judgment is affirmed."

Thus, petitioner was held to serve a life sentence for the first degree murder charge.

III

A petition for habeas corpus was filed with the First Appellate District Court and subsequently denied on the 29th day of April 1985. There is no other appeals, petitions or actions pending in this case in any other court.

IV

Petitioner suffers from illegal restraints because he was deprived of his constitutional right to the effective assistance of counsel at the trial level.

Further, petitioner contends that his appellate counsel was also ineffective in that all issues were not presented to the appellate court for consideration.

Petitioner maintains that the evidence is insufficient to support the findings of a first degree murder.

That prosecutional misconduct swayed the jury in favor of the prosecution's case and prejudiced the jury against defendant.

That the testimony of Doctor Lowe was obtained in violation of petitioner's Miranda rights and was illegally used in the trial.

That the issue of "credibility" as well as the "reliability" of the emotionally handicapped children that testified against petitioner.

That the issue of "intent" was not settled nor placed before the jury to establish a first degree murder charge.

That the conviction is in violation of the California felony-murder rule.

That petitioner was held for five days without the benefit of arraignment in violation of Penal Code, section 825.

For all the foregoing reasons, petitioner was denied a fair trial and denied a meritorious defense.

V

The grounds set forth herein have not been previously presented by this petitioner to this or any other court, state or federal, in any petition, motion or application, except insofar as presented in petitioner's direct appeal and in the writ of habeas corpus to the appellate court which was denied.

VI

Petitioner believes the record is sufficient to entitle him to a reversal of his conviction. Petitioner has no other plain, speedy, or adequate remedy at law.

Wherefor, petitioner respectfully requests that this Court:

1) Issue its order to show cause to the Director of the Department of Corrections to inquire into the legality of petitioner's present incarceration;

2) After a full hearing issue the writ vacating the judgment of conviction with instructions to grant petitioner a new trial;

3) Grant petitioner whatever further relief is deemed fair and appropriate and in the interest of justice.

Dated: May 16, 1986

Respectfully submitted

Original Signed
Owen Duane Nunnemaker
In Pro Per

ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

I

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

The Constitutional right to counsel mandates more than a pro forma appearance and mere physical presence in the court room (Powell-vs-Alabama (1932) 287 U.S. 45, 57-58, 77 L.Ed. 158, 53 S.Ct. 55; People-vs-Locklar (1978) 84 Cal.App.3d 224, 229, 148 Cal.Rptr. 322).

Petitioner contends that trial counsel for defendant did not diligently or actively participate in the case preparation (People-vs-Borba (1980) 110 Cal.App.3d 989, 994-997, 168 Cal.Rptr. 305). It is a matter of law that an attorney has specific responsibilities to his client regardless of whether or not he is retained or appointed counsel. It is counsel's duty to investigate carefully and fully all defense issues of fact and law that may be available to the defendant. If his failure to do so results in a withdrawal of a crucial defense, the defendant has

not had the effective assistance to which he is entitled. Since even tactical, as well as strategic determinations of trial counsel must have some rational support founded on reasonable, sound legal principles and fully developed facts (People-vs-Zimmerman (1980) 102 Cal.App.3d 647, 657, 659, 161 Cal.Rptr. 669; People-vs-Cooper (1979) 94 Cal.App.3d 672, 679-683, 156 Cal.Rptr. 646) the actions, or lack of actions on the part of trial counsel denied him to a fair trial. The record will also reflect that counsel failed to investigate the facts in the manner of a diligent and conscientious advocate (People-vs-Mozingo 34 Cal.3d 926, 928; People-vs-Fosselman 33 Cal.3d 572, 189 Cal.Rptr. 855 [Supp. 1983]).

Petitioner asserts that a right to counsel encompasses the right to effective assistance of counsel, which in turn encompasses the right of services of proper investigation. (People-vs-Superior Court 96 Cal.App.3d 936)

Counsel's failure to properly investigate and prepare denied defendant his constitutional right to "effective aid in the preparation and subsequent trial of the case (People-vs-Ibarra (163) 60 Cal.2d 460, 464; People-vs-Alabama (1932) 287 U.S. 45, 71; 77 L.Ed. 158, 172, 53 S.Ct. 55, 84 A.L.R. 527).

In the case at hand, the prosecution's psychiatrist Doctor Lowe, did not advise petitioner of his constitutional rights before interviewing him. Doctor Lowe took advantage of the fact the petitioner was in pain and came in as a medical doctor, not a prosecutional psychiatrist. The statements made by petitioner during the "examination" were used by the psychiatrist in reaching his conclusion that petitioner did premeditate the killing of his wife. Petitioner maintains that as soon as the questions began, he requested that the Doctor identify who sent him and that the interview (as it was later called) lasted approximately five minutes, not an hour plus, as was testified.

No matter what was said in the course of the interview, it was all in violation of petitioner's rights under Miranda, and trial counsel failed to object to their admission. The result was that petitioner's defense of "diminished capacity" was seriously hampered.

When a defendant contends upon appeal that the statements to law enforcement personnel or prosecution's employed assistants, as was done in this case, the appellate court is required to conduct an independent review of the uncontradicted facts presented to the lower court. As the rule is summarized in People-vs-Mc Clary (1977) 20 Cal.3d 218, 227:

> "As a reviewing court it is our duty to examine the uncontradicted facts to determine independently whether the trial court's conclusion of voluntariness was properly found ...
>
> In exercising this function the court recognizes that the burden is on the prosecution to show that a confession was voluntarily given without previous inducement, intimidation or (threat) .... [Citation] Thus in making an independent examination of the record to ascertain whether defendant's statements were voluntary we follow a practice of the United States Supreme

> Court which is both well established .... and currently adhered to .... [Citation]" (People-vs-Sanchez (1969) 70 Cal.2d 562, 571-572 [Citations omitted]; See People-vs-Haydel (1974) 12 Cal.3d 190, 198 [Citation omitted]; People-vs-Randall, supra 1 Cal.3d 948, 954). With respect to conflicting testimony, of course, 'we accept that version of events which is most favorable to the People, to the extent that it is supported by the record.' (Ibid.; accord People-vs-Duck Wong (1976) 18 Cal.3d 178, 187 [Citations omitted]; People-vs-Carr (1972) 8 Cal.3d 287, 296 [Citations omitted].)"

The facts in this case are not simple. There was a man who went to the County Jail as a medical doctor. He was in fact, sent by the prosecution. Petitioner had stated that he did not want to speak to any law enforcement people or their agents about the matter for which he was arrested. It is a matter of record that petitioner had medical problems and was in fact taking several pain medications. He had requested to see a doctor for both medication and examination. Instead, he was sent a psychiatrist, who neither advised petitioner of his rights, nor of his true purpose for being there. Subsequently, the use of anything that petitioner may have said to Doctor Lowe and later used by

prosecution constituted prejudicial error because it was not preceded by a valid Miranda waiver.

Petitioner states that the adjudication of which he has been totally deprived of by the failure of counsel greatly diminished his defense and supports his contention that trial counsel was not a diligent advocate. It is not required that counsel be error free, but [in] the case at hand, the absence of objection denied petitioner an important defense issue. The record cannot be void of some basis for the omission (People-vs-Lanphear (1980) 26 Cal.3d 814.) It is for the foregoing reason and those within the record, petitioner contends that trial counsel failed to perform with reasonable competence.

Further, that such failure prejudiced petitioner to the degree that it is reasonably probable that a determination more favorable to the defendant would have resulted, absent from counsel's failings.

II

THE EVIDENCE IS INSUFFICIENT TO ESTABLISH THAT THE HOMICIDE WAS OF SUCH CRUELTY AND AGGRAVATION AS TO SUSTAIN A FIRST DEGREE MURDER VERDICT OR EVEN TO ESTABLISH MALICE AFORETHOUGHT

In the case of People-vs-Bassett, 69 Cal.2d 122, 70 Cal.Rptr. 193 (1968), the court recognized its task as two-fold: To resolve issues raised by appellant in light of the whole record and to judge whether the evidence of each of the essential elements constituting a higher degree of the crime is such "ponderable legal significance" as to sustain the verdict of the trier of fact. In determining whether the record is sufficient in this respect, the appellate court may give credit to evidence which is reasonable in nature, credible and of solid value (People-vs-Redmond 71 Cal.2d 745 (1969). The prosecution's burden is a heavy one: To justify a criminal conviction, the trier must have reasonably rejected all that undermines confidence (People-vs-Redman, supra).

The only evidence presented by the prosecution to prove that petitioner premeditated the killing of his wife was the testimony of Doctor Lowe. He stated that in his opinion that he felt petitioner was not psychotic (IV RT 102, 142) and that he (Mr. Nunnemaker) acted with premeditation (IV RT 116).

The crime of murder in the first degree is a unique offense which requires the prosecution to prove a very specific pattern of conduct. In order to support a verdict of first degree murder, the evidence must clearly prove beyond a reasonable doubt that petitioner engaged in a "willful, deliberate and premeditated killing" (Penal Code, section 189).

The term "premeditated" as used in Penal Code, section 189 means "to think on and resolve in the mind beforehand (People-vs-Honeycutt (1946) 29 Cal.2d 60).

A homicide which occurs during the course of a violent and spontaneous quarrel can never be first degree murder as a matter of law (People-vs-Bender

(1945) 27 Cal.2d 164; People-vs-Wolff (1964) 61 Cal.2d 795).

When the evidence establishes that a homicide occurred during or immediately following a sudden and heated argument, the element of premeditation is negated since "the expressed requirement for a concurrence of deliberation and premeditation excludes from murder of the first degree those homicides which are the result of mere unconsidered or rash impulse hastily executed (People-vs-Bender, supra at 185).

To support a verdict of first degree murder more is required than a mere "understanding and comprehension of the character of the act" (People-vs-Wolff, supra at 822). As a general rule a homicide committed during the heat of passion can never be murder of the first degree (People-vs-Nero (1971) 19 Cal.App.3d 904.)

The reported decisions of the California Supreme Court and the Court of Appeals demonstrate a bright line of holdings that first degree murders convictions resulting from killing during the course of sudden

quarrels will be reduced from first degree to second degree as a matter of law. (People-vs-Caylor (1968) 259 Cal.App.2d 191; People-vs-Fonville (1973) 35 Cal.App.3d 693; (People-vs-Nero, supra; People-vs-Wolff, supra, People-vs-Bender, supra; People-vs-Anderson (1968) 70 Cal.2d 15; People-vs-Tubby (1949) 34 Cal.2d)

The general rule set in Tubby is as follows:

> "Generally the determination of the degree of the crime is left to the discretion of the jury. But the jury's discretion is not absolute. Since the amendment of Penal Code, section 1181 in 1927 trial courts and reviewing courts are authorized to modify the judgment and fix a lesser degree of the crime ..." (Tubby, supra at 76)

The case at hand provides testimony that when petitioner came to the door of his home, it was with the intent to give his son Shawn a birthday gift. An argument begins at the door of Nunnemaker home and continues into the living room. The testimony adduced at trial states that a struggle took place. In the course of the struggle the weapon was discharged, firing one shot that caused the death of Mrs. Nunnemaker.

Murder is defined by statute in California as "the unlawful killing of a human being, with malice aforethought." (Penal Code, § 187) "Such malice may be expressed or implied. It is expressed when there is manifested a deliberate intention to take away the life of a fellow creature. It is implied when no considerable provocation appears or when circumstances attending the killing show an abandoned and malignant heart." (Penal Code, § 188)

There was no intent to kill when petitioner went to his home. All he wanted was some time with his son, not arguments and certainly not to kill his wife.

"All murder which is perpetrated by means of destructive device or explosive, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any other act punishable under section 288, is murder of the first degree; and all

other kinds of murders are [of] the second degree (Penal Code, § 189).

Petitioner contends that the record will support that the first degree murder conviction is in error. The shooting occurred as the result of an argument and subsequent struggle, not premeditation.

The plain language of the California Penal Code demonstrates that section 189 was intended only to be such a degree-fixing device as established by the (preceding) codes. Section 189 states that all murder committed in the perpetration of one of the enumerated felonies is murder of the first degree. Section 187 specifically defines the term murder; it is an unlawful killing with malice aforethought. While such malice may be imputed by common law felony murder rule (see People-vs-Doyell (1874) 48 Cal. 85, 94; (People-vs-Phillips (1966) 64 Cal.2d 574, 582), section 187 expressly requires that a killing be accompanied by malice before it will be labelled "murdered".

Petitioner had no malice in his mind or heart the day he went to his home. He simply wanted to spend a short time with his son on the day of his son's birthday.

The court originally interpreted Penal Code, section 1105 as placing on the defendant the burden of proving, by a preponderance of the evidence, that he lacked malice (People-vs-Hong Ah Duck (1882) 61 Cal. 387, 396; People-vs-Raten (1883) 63 Cal. 421, 422). The burden diminished into a burden of raising a reasonable doubt as to malice (People-vs-Wells (1938) 10 Cal.2d 610, 622) and then into a burden of production of evidence, with no burden of persuasion (Jackson-vs-Superior Court (1965) 62 Cal.2d 521, 526; People-vs-Loggins (1972) 23 Cal.App.3d 597, 602; People-vs-Kelly (1980) 113 Cal.App.3d 1005, 1012). The court in Kelly observed that the Due Process Clause would prohibit any burden heavier than the mere burden of production of evidence, and that the prosecution is constitutionally required to prove malice and the absence of heat of

passion beyond a reasonable doubt (People-vs-Kelly, supra, 113 Cal.App.3d 1005, 1012, 1013.)

III

PREJUDICIAL MISCONDUCT ON THE PART OF PROSECUTION SERVED TO INFLUENCE THE JURY AGAINST PETITIONER

The record in this case will demonstrate that defense counsel made no objections to the misconduct on the part of prosecution. This can only go to the fact that trial counsel was not a diligent advocate for petitioner. It does not remove the harm that was done, nor the prejudice that was installed in the mind of the jury against petitioner. The objectionable comments can best be viewed in the same manner as stated by the Court in Ozuna:

> "The objectionable testimony was produced in order to strengthen the People's case by generating prejudice in the minds of the jurors. It is our opinion that its use for that purpose was not only serious misconduct but was fraught with such harm to defendant as to be irremediable ..."
>
> (People-vs-Ozuna, supra 213 Cal.2d 338, 342)

The prosecutor's statements and tactic served two objectives both prejudicial to petitioner; (1) Prosecution presented the jury with a counterfeit token of guilt and awareness of guilt by use of the telephone conversation between petitioner and police. Further, prosecution changed the wording of that conversation to fit his case. (2) It used maligning tactics, placing before the jury a divorce case along with the murder trial. The statements made by the prosecutor were an inflammatory characterization of petitioner not support[ed] by fact, nor was it relevant to the case. As the court remarked in Giles-vs-Maryland 386 U.S. 66, 100 (1967):

> "A criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The State's pursuit is justice, not a victim."

The pursuit of justice seem far from the "game" that seemingly took place at the expense of petitioner.

The charge of prosecutional misconduct is a serious one, especially when it is supported by the record. Petitioner contends that prosecution attempted to sway

and persuade the jury by use of deliberately misstating the evidence; by repeated attempts to lead, direct and obtain elicit testimony from witnesses that he instructed (Sherry Thomas, an emotionally disturbed child) in his attempts to instill in the minds of the jury members that petitioner was a drunken, lazy, cruel husband, father and person, who treated his wife like a slave.

This was a "premeditated" course on the part of the prosecutor to influence the jury in their finding of first degree murder. The prosecutor then calls Linda Rivera (also an emotionally disturbed child) to reinforce the image "he" is putting forth. (See People-vs-Purvis 60 Cal.2d 323, 33 Cal.Rptr. 10 [1963])

It is settled that asking questions for answers that have been asked and answered to be inadmissible and improper, or asking questions for the purpose of prejudicing the jury against a defendant manifests "bad faith" on the part of prosecution (People-vs-Dorsey 43 Cal.App.3d 953, 118 Cal.Rptr. 362 (1974).

The court held in People-vs-Grider, supra 13 Cal.App. 703 (1910) that a test can be applied to determine whether prosecution had committed misconduct in asking an improper question of a witness:

> "What was the purpose of prosecution in asking the question. If it was to take an unfair advantage of the defendant by intimating to the jury something that was either not true or capable of being proven in the manner attempted, then it is error. And if the prosecutor knows when he asks the question that an objection to the question should or will be sustained, the error is not corrected because the objection is sustained ..." (at page 712)

Similar misconduct by the State's advocate psychiatrist, Doctor Lowe, cannot be dismissed. During cross-examination, Doctor Lowe volunteered the following:

> "There is evidence that I don't know whether it has been introduced into court or not, into trial, that indicated at one point that he said you know, if she leaves me, I will [kill her]."
> (I RT 117 Emphasis added.)

Petitioner rejects the possibility that prosecutor's and his advocate's misconduct was accidental. A prosecutor is under a duty to guard against inadmissable statements from his witness and guilty of misconduct I

when he is in violation of his duty. (People-vs-Baker 147 Cal.App.2d 319, 324).

IV

ADMISSION OF TESTIMONY OF DOCTOR LOWE WAS IN VIOLATION OF PETITIONER'S RIGHTS UNDER MIRANDA

Petitioner was allegedly interviewed by Doctor Lowe on June 2, 1975 at the Sonoma County jail at the expressed directions and knowledge of the District Attorney. This interview was conducted in violation of the "safeguards" as set forth in Spencer (In re Spencer (1965) 63 Cal.2d 400, 410).

Further, it was held in direct violation of petitioner's Miranda rights (Miranda-vs-Arizona, supra 384 U.S. at page 471 [16 L.Ed.2d at page 721-22]).

It was never clear whether petitioner fully understood the nature of his relationship to Doctor Lowe, nor did Doctor Lowe make clear his involvement in the case or the proceedings of the alleged interview. Petitioner contends that upon Doctor Lowe's arrival at the County Jail, he neither stated that he was a

psychiatrist or an "advocate" with the District Attorney. Nor was petitioner advised that he did not have to talk to Doctor Lowe, or that he had the right to counsel during the interview. Under these circumstances, the prosecution failed to meet its heavy burden of demonstrating petitioner knowingly and intelligently waived his Miranda rights prior to his interview with Doctor Lowe.

The time sequence surrounding petitioner's interview with Doctor Lowe must also be taken into consideration in determining whether the statements that may or may not have been made were voluntarily obtained. Petitioner was taken into custody May 30, 1975. He had stated that he had nothing to say to anyone about anything. He was held without arraignment and on June 2nd, 1975 he (was) taken down for an "interview with a doctor." The one thing that petitioner did request was "medical treatment" as he had been injured in an accident and was in pain.

According to the District Attorney's Office petitioner was supposed to be arraigned the next morning.

When an arrest is made without a warrant, "the person arrested if not otherwise released, shall, without unnecessary delay be taken before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person shall be laid before such magistrate." (Penal Code, § 849, subd. (a), emphasis added.)

In People-vs-Powell (1967) 67 Cal.2d 32, 58-60, this Honorable Court stated that unnecessary delay in arraignment "violates a fundamental right of the arrested person and is in disobedience of the law." (Id. at page 59.) Indeed, "The principal purposes of the requirement of prompt arraignment are to prevent secret police interrogation, to place the issue of probable cause for the arrest before a judicial officer, to provide the defendant with full advice as to his rights and an opportunity to have counsel appointed, and to enable him to apply for bail or habeas corpus when necessary."

(Id., at p. 60, emphasis added.) Police violations of the letter and the spirit of this law are to be "firmly condemned." (People-vs-Pettingill, supra, 21 Cal.3d 231, 243.)

In determining whether a defendant's statement is involuntary, the totality of the circumstances surrounding the statement must be taken into account (People-vs-Haydel (1974) 12 Cal.3d 190, 198; Schneckloth-vs-Bustamonte (1973) 412 U.S. 218, 226 [36 L.Ed.2d 854, 862). Clearly, one of those circumstances in the instant case is the fact that petitioner had not been arraigned at the time of the interview by Doctor Lowe, at the District Attorney's direction.

It needs to be stated that there appears to be no reason why Doctor Lowe could not have waited until petitioner was properly arraigned and counsel appointed before attempting this interview. It was the clear intention of the prosecution to have petitioner arraigned by Doctor Lowe before his arraignment. Such a blatant plan to conduct a secret interview with petitioner prior

to arraignment and in the absence of counsel is the precise harm which is sought to be avoided by a requirement of a prompt arraignment. (People-vs-Powell, supra.)

Therefore, petitioner's statement on June 2, 1975, to Doctor Lowe were made without an effective Miranda advisement and waiver. The weight from this prejudicial error alone compels the vacating of petitioner's present conviction.

V

THE STATEMENTS MADE BY DOCTOR LOWE CONSTITUTE GROSS PREJUDICIAL ERROR

An admission erroneously admitted at trial in violation of Miranda is deemed prejudicial unless the People can show beyond a reasonable doubt that the error complained of did not contribute to the verdict. (People-vs-McClary, supra, 20 Cal.3d 218, 230; Chapman-vs-California (1967) 386 U.S. 18, 23-24.)

In the case now before this Court, Doctor Lowe's testimony as a rebuttal witness for the prosecution,

based upon petitioner's comments made during the June 2nd, 1975 interview, went to the very heart of the defense and compels that the judgment be vacated.

It was stated that the central issue in the case was petitioner's state mentally at the time the acts were committed. Defense counsel argued that there was no question that petitioner shot his wife, but the issue was his mental condition. In response to this defense, the prosecution called Doctor Lowe as a rebuttal witness on the issue of petitioner's mental capacity. Lowe stated that it was his opinion that petitioner was sane at the time of the commission of the alleged offense and further went on to say that petitioner acted with premeditation. Doctor Lowe testified that petitioner suffered no mental disease or defect; showed no signs of being psychotic; and did not have diminished capacity.

In light of the stated mental defense, the verdict of the jury and the nature of Doctor Lowe's rebuttal testimony on behalf of the prosecution, it certainly cannot be said beyond a reasonable doubt that the error

complained of did not contribute to the verdict. Therefore the judgment of conviction must be vacated on all counts. (People-vs-Walker, supra, 29 Cal.App.3d 448, 455-456.)

Justice Jefferson in the Walker case stated the following:

> "Had Doctor Patterson been appointed by the court to examine the defendant, his testimony would not have been admissible under the circumstance of the case. None of the safeguards were employed. There appears to be no justification for allowing inroads on constitutional protections by police psychiatrists that would not be allowed to those appointed to the court." (29 Cal.App.3d at p. 456.)

Walker was examined by the direction of the District Attorney's Officer as was done in the case now before this court. It was not at the direction of a court, no Justice order[ed] the examination and it all was done before the arraignment of petitioner.

As this Court is aware, a violation of the right to counsel occurs when any of the three safeguards under Spencer are breached. The mere breach of the first

safeguard under Spencer deprived petitioner of his right to counsel and requires that the conviction be vacated.

VI

THE ISSUE OF "CREDIBILITY" AS WELL AS THE "RELIABILITY" OF THE EMOTIONAL DISTURBED CHILDREN LEFT UNQUESTIONED CONSTITUTES ERROR

Although the testimony of Sherry Thomas and Linda Rivera had been impeached at the time of trial, the adverse effect on the jury cannot be removed by mere court admonishments. Petitioner contends that the prejudicial effect of these emotional disturbed children on the jury was so that [it] swayed the jury in favor of the prosecutions case in chief.

The court's failure to hold a hearing, out of the presence of the jury constitutes error. In Evidence Code section 780, which states in part:

> "Section (c) The extent of his/her capacity to perceive, to recollect, or to communicate any matter about which he/she testifies.
>
> "(d) The extent of his/her opportunity perceive any matter about which he/she testifies.

"(e) His/her character for honesty or veracity or opposites.

"(f) The existence or nonexistence of a bias, interest, or other motive.

The court had a responsibility to request an examination to determine the capacity of the witnesses, in this case, two (2) emotional disturbed children, for veracity. The prosecution was quick to have petitioner examined, but failed to examine the children.

It is well established fact that emotionally disturbed children are not often truthful. Most are simply unable to determine a truth from a nontruth.

As explained in People-vs-Russell (1968) 69 Cal.2d 187 [70 Cal.Rptr. 216, 443 P.2d], the question before the trial court is "whether, in light of the totality of the circumstances revealed, it is necessary or proper that a psychiatric knowledge in general be utilized in order to aid the trier of facts in the assessment of credibility. (Id., at p. 195.)

In the matter of an emotional disturbed child it would be most difficult without the assistance of a

trained professional to determine the capacity for truthfulness.

It is more than apparent from the testimony that prosecution did in fact "school" both of the emotionally disturbed children and subsequently guided them through the testimony that he wished to obtain from them. It is still a question as to what these two children did or did not see and in fact, witness.

CONCLUSION

Petitioner's delay in the filing of this petition for writ of habeas corpus is attributable to his lack of capacity to represent himself (see In re Saunders (1970) 2 Cal.3d 1033, 1040) and the scarcity of channels through which legal assistance is available to an indigent prisoner.

Further, petitioner is without funds and unable to afford the cost of counsel to handle a petition for writ of habeas corpus.

As set forth in this petition, and through all the records, files briefs and subsequent attachments,

petitioner prays of this court to issue an order to show cause why the herein relief should not be granting.

Further, to issue an order vacating the judgment of conviction and subsequent life sentence imposed by the Sonoma Superior Court.

DATED: May 16, 1986

Respectfully submitted,

Original signed
Owen Duane Nunnemaker
Petitioner In Pro Per

PROOF OF SERVICE BY MAIL

I, Owen Duane Nunnemaker, am the petitioner in the foregoing action. I personally served a true copy of the foregoing "PETITION FOR WRIT OF HABEAS CORPUS" on the party whose name and address is listed below, by placing said true copy, with postage fully paid, within the California Medical Facility Mail Room on the 17th day of May, 1986

California Attorney General's Office
1515 K Street, Suite 511
Sacramento, California 95814

I, Owen Duane Nunnemaker, declare under the penalty of perjury the foregoing is true and correct to my own personal knowledge.

Executed on the 17 day of May 1986 at Vacaville, California.

Original Signed
Owen Duane Nunnemaker

ORDER DENYING WRIT OF HABEAS CORPUS

Criminal No. 25449

IN THE SUPREME COURT OF THE STATE OF CALIFORNI

IN BANK

In re NUMMEMAKER (OWEN DUANE)

on Habeas Corpus.

Petition for writ of habeas corpus DENIED.

(In re Swain (1949) 34 Cal.2d 300, 304; In re Waltreus (1965) 62 Cal.2d 218, 225.)

Original Signed - BIRD
Chief Justice

SUPREME COURT FILED: December 3, 1986
Lawrence P. Gill, Clerk

BEST AVAILABLE COPY

U.S. NORTHERN DISTRICT COURT OF CALIFORNIA
FILED: SEPTEMBER 8, 1987
WILLIAM L. WHITTAKER, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

OWEN DUANE NUNNEMAKER Petitioner, v. EDDIE YLST Respondent.	No. C 87 0409 TEH ORDER

This matter comes before the court on a prisoner's petition for a writ of habeas corpus. Petitioner raises four claims: Ineffective assistance of trial counsel; ineffective assistance of appellate counsel; insufficient evidence to convict of first degree murder; and admission of petitioner's statement in violation of his rights under Miranda.

The petition is not entirely clear as to the procedural history of this matter. Petitioner states that none of his claims were raised by way of direct appeal

in the California courts. However, petitioner did present these and other claims to the California Court of Appeal and Supreme Court by way of a habeas petition. The California Supreme Court denied the petition, citing In Re Waltreus, 62 Cal.2d 218, 225 (1965) and In re Swain, 34 Cal.2d 300, 304 (1949). These citations are cryptic. Walthus holds that arguments rejected on appeal will not be reviewed again in habeas; thus the implications of this citation contradict petitioner's assertion that he did not raise these claims on appeal. Swain, in contrast, holds that habeas claims not pleaded with sufficient particularity must be dismissed without prejudice. This latter citation implies that at least some of petitioner's claims were not presented on appeal, and the California Supreme Court declined to consider their merits on procedural grounds.

As to any claims raised on appeal to the state courts and rejected on the merits, petitioner has exhausted his state remedies on this court can hear his habeas petition. Maxwell v. Summer, 673 F.2d 1031,

1034 (9th Cir. 1982). However, any claims not raised on appeal, and whose merits the state courts have not considered on habeas, must be dismissed for failure to exhaust state remedies, because petitioner has not given the state courts a fair opportunity to consider the merits of these claims. Vasquez v. Hillery, 106 S.Ct. 617, 620-22 (1986). Therefore, those claims which the California Supreme Court dismissed on the basis of Swain have not been exhausted, unless petitioner alleges that it is impossible to plead them with more particularity, and hence that the court's dismissal amounts to a dismissal on the merits. Harris v. Superior Court, 500 F.2d 1124, 1128 (9th Cir. 1974); Kim v. Villalobos, 799 F.2d 1317 (9th Cir. 1986).

Petitioner has several choices. If he can show that he did indeed raise some of his claims on appeal, he may return to this court with those claims. As to claims he did not raise on appeal, his remedy is to file another application for a writ of habeas corpus to the California Supreme Court, pleading his claims with greater

particularity. If this is impossible, he can instead return to this court and allege that the California Supreme Court's dismissal for insufficient particularity amounts to a dismissal on the merits.

Once petitioner determines which of his claims are exhausted and which are not, he again has two choices. He may exhaust all his claims by filing another application for habeas corpus with the state court, or delete his unexhausted claims from his petition and return immediately to this court with only his already exhausted claims. However, under Rose v. Lundy, 455 U.S. 509 (1982), if he later returns to federal court when his other claims have also been exhausted, he runs the risk of having his later petition dismissed as an abuse of the writ of habeas corpus under Rule 9, 28 fol. U.S.C. § 2255, for successive petitions.

Good cause appearing, IT IS HERELY ORDERED that the petition for a writ of habeas corpus is dismissed without prejudice. IT IS FURTHER ORDERED that the Clerk of the Court

shall send a copy of the order to the petitioner by certified mail.

IT IS SO ORDERED.

DATED: September 8, 1987

Original signed
THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

U.S. NORTHERN DISTRICT COURT OF CALIFORNIA
FILED: DECEMBER 3, 1987
WILLIAM L. WHITTAKER, CLERK

ENTERED IN CIVIL DOCKET: December 4, 1987

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OWEN DUANE NUNNEMAKER Petitioner, v. EDDIE YLST Respondent.	)	No. C 87 0409 TEH ORDER

This matter comes before the court on a prisoner's petition for a writ of habeas corpus. Petitioner resubmits his habeas petition, following this Court's Order of September 8, 1987 dismissing the original petition without prejudice. However, petitioner has not responded to the procedural problems which caused this Court to dismiss his previous petition.

Since the procedural rules applicable to this petition are complex, this Court will again try to explain why the

first petition was dismissed, and what petitioner must to do allow this Court to reach the merits of his claims.

The problem is that the California Supreme Court's denial of petitioner's state habeas petition is ambiguous. That Court refused to review each of petitioner's claims either because it was raised and rejected on appeal, under In Re Waltreus, 62 Cal.2d 218, 225 (1965) or because it was not pleaded with enough particularity (i.e. with enough factual detail for the court to understand the basis for claim), under In Re Swain, 34 Cal.2d 300, 304 (1949).

Petitioner must tell this Court precisely which claims he raised on appeal, and provide supporting exhibits such as his appellate brief and/or the appellate court's decision. Once this Court is properly informed that a claim has already been raised on appeal to the state court, we can address it in a habeas petition.

If the current habeas petition also includes any claims not raised on appeal--claims which would have been rejected on Swain grounds in the state habeas

proceeding- this Court cannot address such claims, because the state court has not yet had a chance to rule on their merits. So, if petitioner now has any claims that were not raised on appeal, he must: (1) again petition the state court for habeas corpus, pleading these claims with more particularity, or (2) return to this Court and explain why he cannot plead these claims with any more particularity, or (3) delete these claims, and return to this Court with only those claims he raised on appeal.

Accordingly, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is again dismissed without prejudice. IT IS FURTHER ORDERED that the Clerk of the Court shall send a copy of the order to the petitioner by certified mail.

IT IS SO ORDERED.

DATED: December 3, 1987

Original signed
THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

S004531
SUPREME COURT FILED: MARCH 1, 1988
LAURENCE P. GILL, CLERK

Owen Duane Nunnemaker, B-72101
California Medical Facility
P.O. Box 2000
Vacaville, California 95696-2000

In Propria Persona

CALIFORNIA SUPREME COURT

Owen Duane Nunnemaker	No. S004531
Petitioner	Petition for Writ of
vs.	Name of person in custody:
Eddie Ylst, Superintendent California Medical Facility	
Respondent	

_____/

1. Owen Duane Nunnemaker, B-72101 in whose behalf the writ is applied for is confined or restrained of his liberty at California Medical Facility by Eddie Ylst, Superintendent for said Facility

2. Name and location of court under whose process person is confined: Sonoma County Superior Court

3. Nature of the court proceeding (e.g., criminal case, commitment for narcotics addiction, insanity, or mentally disordered or abnormal sex offender) and the case number, if known, resulting in the confinement: Action No. 7869-C, First Degree Murder, violation of Penal Code section 187

4. The date of the judgment, order or decree for confinement and its terms: March 15, 1976 to life imprisonment pursuant to former Penal Code section 1168

5. What plea was entered in the above proceeding (e.g., guilty, not guilty,not guilty by reason of insanity, nolo contendere, etc.)? Not guilty, Not guilty by reasons of diminished capacity

6. Check whether trial or hearing was by:
(a) X a jury
(b) _ a judge without trial

7. Was an appeal taken? Yes

8. If you answered "yes" to (7), list
(a) The name of each court to which an appeal was taken:
i First Appellate District Court of Appeal
ii California Supreme Court

(b) The result in each court:

i Judgment affirmed

ii Petition for hearing denied

(c) The date of each such result and, if known, citations of any written opinions or orders entered:
i People v. Nunnemaker, Unpub. Case No. 1 Crim.
No. 15379-6/30/78
ii Ditto 9/27/78

9. If the answer to (7) was "no," state the reasons for not so appealing: N/A

10. State concisely the grounds on which you base your allegation that the imprisonment or detention is illegal:
(a) Please see pages attached.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):
(a) Please see pages attached

12. Have any other applications, petitions or motions been filed or made in regard to the same detention or restraint? Yes

13. If you answered "yes" to (12), list with respect to each petition, motion or application:
(a) The specific nature thereof:
i Habeas Corpus
ii Habeas Corpus
iii Habeas Corpus
iv Habeas Corpus

(b) The name and location of the court in which each was filed:
i Superior Court of Sonoma County
ii First Appellate District Court of Appeal
iii California Supreme Court
iv US Northern District Court

(c) The disposition thereof:
i Denied summarily
ii California Court of Appeal-First Appellate District
iii California Supreme Court
iv US Northern District Court of California

(d) The date of each such disposition:
i Feb. 25, 1985
ii Unk
iii December 3, 1986
iv September 8, 1987; December 3, 1987 (See Attached Exhibit B & C)

(e) If known, citations of any written opinions or orders entered pursuant to each such disposition:

i In re Nunnemaker # 138158
ii Unk
iii In re Nunnemaker # 25449
iv Civ # 87-0406 TEH; 87-5868 TEH, respectively

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application? Yes

15. If you answered "yes" to (14), identify:
(a) Which grounds have been previously presented:
i Same grounds raised herein.

(b) The proceedings in which each ground was raised:
i Habeas Corpus

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) A stated, the issue was previously raised but was denied summarily with the court citing In re Swain, In re Walterus. However, in Pope this Court stated its preference that inadequate counsel be raised on habeas corpus. This was not done before 1986 mainly because I was ill and physically incapacitated with affliction. Only in 1986 was I able to present the issue for the first time and the court cited Swain possibly for my having failed to state reason for the delay.

17. In the proceeding resulting in the confinement complained of, was the representation by an attorney at any time during the course of:
(a) The proceedings prior to trial? Yes
(b) The trial or hearing? Yes
(c) The sentencing or commitment? Yes
(d) An appeal? Yes
(e) The preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction? No

18. If you answered "yes" to one or more parts of (17), list the name and address of each such attorney and the proceeding in which he appeared:
(a) Charles Dresow, Attorney at Law, 899 Ellis St., San Francisco. appeared with petitioner during trial.
(b) Salle S. Solady, 2325 Third St. #423, San Francisco, was counsel on appeal.

19. Is the person in custody represented by an attorney in any matter relating to this confinement? No

If so, state the attorney's name and address:

20. If this petition might lawfully have been made to a lower court, state the circumstances justifying an

application to this court: Petitioner has no otherwise plain or speedy remedy at law for redress of his contentions. This Court has jurisdiction pursuant to Art. VI, section 10 of the California Constitution.

I, the undersigned, say:

I am the petitioner in this action; the above document is true of my own knowledge, except as to matters that are stated in it on my information and belief, and as to those matters I believe it to be true.

Executed on Feb. 29, 1988 at CMF Vacaville, California.

I declare under penalty of perjury that the foregoing is true and correct.

Original Signed
Owen D. Nunnemaker

FAILURE TO OBJECT TO INTRODUCTION OF EXTRAJUDICIAL STATEMENTS OF DEFENDANT OBTAINED IMPROPERLY DURING SURREPTITIOUS INTERROGATION CONDUCTED BY PROSECUTION PSYCHIATRIST DURING WHICH PETITIONER WAS NOT REPRESENTED BY COUNSEL, CONSTITUTES (INEFFECTIVE) TRIAL COUNSEL REPRESENTATION.

Petitioner alleges his statements to prosecution psychiatrist were clearly inadmissible because obtained during surreptitious interrogation during which time petitioner was not afforded an attorney present during the interview. He contends he was deprived of a fair trial as a result of defense counsel's failure to object to the testimony of the prosecution psychiatrist although the California Supreme Court as early as the year 1965 had held such testimony inadmissible unless the defendant had been afforded the presence of counsel during the psychiatrist examination. (In re Spencer (1965) 63 Cal.3d 400, 410). The surreptitious interview complained of in the instant petition was conducted by the prosecution psychiatrist approximately 10 years following the California Supreme Court's holding in Spencer during approximately June, 1975, while

petitioner was being detained in the custody of Sonoma County Jail officials where petitioner had requested to be examined by the jail medical physician in an effort to obtain medical attention for a back injury which was then causing him excruciating pain.

Petitioner was subsequently informed by jail official that a doctor would be notified but was not told that the doctor would be a prosecution psychiatrist. Thus he believed only that the doctor was there to provide medical treatments for his ailing back problems. Petitioner became suspicious after some time during the consultation with the doctor because the questions asked of him tended not to focus upon his medical needs but continued to relate to the crime of which he was charged to which petitioner had made statements of an incriminating nature. By that time petitioner asked and the doctor identified himself as being a prosecution psychiatrist. Whereupon petitioner stated he did not desire to answer anymore questions and the interview was thereupon terminated, but only after the

prosecution psychiatrist had obtained a number of incriminating statements that would later prove to be prejudicial to petitioner's trial defense of diminished capacity. Petitioner's trial commenced on January 13, 1976 and during the course of the trial the prosecution psychiatrist was permitted to testify as to statements that were illegally obtained from petitioner during the June interview with petitioner, without any objection by defense counsel, and petitioner was found guilty of first degree murder. Defense counsel had failed to object although petitioner described for him the circumstances under which the interview took place in the Sonoma County Jail. Defense counsel told petitioner it was done, that there was nothing he could "do about it now." Petitioner himself was unaware of the Spencer decision or he would have complained to the trial court that he was not [receiving] adequate counsel representation. After conviction, petitioner filed timely notice of appeal.

On direct appeal, appellant counsel argued that the prosecution psychiatric testimony of Dr. Lowe was

inadmissible upon the grounds that the statements of petitioner to which the doctor testified had all been obtained in violation of Miranda v. Arizona (1966) 384 US 436 and People v. Bennett (1976) 58 Cal.App.3d 230, 236-237 and fn. 3). The Bennett decision was rendered on May 13, 1976 and established that Miranda principles apply to custodial interrogation of a defendant by a prosecution psychiatrist. In the case at bar, Dr. Lowe had failed to identify himself as a prosecution psychiatrist and failed to apprise petitioner of his rights to counsel present during the interview before conducting the interrogation.

The Court of Appeal in People v. Nunnemaker 1 Crim. No. 15379 (unpub) concluded that the error which occurred in the instant case may not be heard for the first time on direct appeal.

In addition, appellant counsel argued that petitioner had been deprived of a meaningful defense of diminished capacity as a result of trial counsel's failure to timely object to the testimony of Dr. Lowe pertaining

to the improper interview conducted of petitioner while being detained in the custody of the Sonoma County jail officials. To prevail under this line of argument the Court of Appeal concluded no relief is availing unless petitioner's trial record establishes that "counsel was either ignorant of the facts or the law resulting in a withdrawal of a crucial defense 'that reduced the trial to a farce and a sham.'" Absent such affirmative showing, the appellate court concluded that petitioner is entitled to no relief. (page 12 of Exhibit A)

Since the affirmance of petitioner's appeal, the "farce and sham" doctrine was formerly abolished by the California Supreme Court in People v. Pope (1979) 23 Cal.3d 412, 422)

Under the Pope decision, to prevail upon a claim of ineffective trial counsel representation, petitioner must show (1) trial counsel's conduct did not fall below the standard of a reasonably competent attorney; and, (2) that he was prejudiced by counsel's omissions.

Petitioner submits that his trial counsel's failure to move for the suppression of the prosecution's psychiatrist testimony pertaining to petitioner including testimony about the surrepitious interview during which the prosecution's psychiatrist elicited statements of an incriminating nature from petitioner, fell below the standard of reasonably competent attorneys in that the omissions did not result from an informed tactical choice. While deferential scrutiny is generally accorded to counsel's strategic choices, "deference is not abdication." (People v. Ledesma (1987) 43 Cal.3d 171, 217.) Counsel's conduct must in fact be "tactical." It must, that is, involve a decision which contemplated some benefit to defendant. (People v. Nation (1980) 26 Cal.3d 169, 179; People v. Horning (1984) 150 Cal.App.3d 1015, 1022-1023; People v. Dorsey (1975) 46 Cal.App.3d 706, 719) If no plausible tactical explanation can be conceived which would justify the challenged act or omission, then effective assistance of counsel is manifest." (People v. Zimmerman 1980) 102

Cal.App.3d 647, 657; see People v. Robertson (1982) 33 Cal.3d 21, 24; People v. Rodriquez (1977) 73 Cal.App.3d 1023, 1027; People v. Bess (1984) 153 Cal.App.3d 1053, 1059; People v. Dorsey, supra.)

A constitutionally acceptable choice must be an informed one, based on "adequate investigation and preparation . . . . If counsel fails to make such a decision, [The] action, no matter how unobjectionable in the abstract -- is professionally deficient. (People v. Ledesma, supra, 43 Cal.3d at p. 215.) As stated in People v. Pope, supra, 23 Cal. 412, 425-426:

> "[W]here the record shows that counsel has failed to research the law or investigate the facts in the manner of a diligent conscientious advocate, the conviction should be reversed since the defendant has been deprived of adequate assistance of counsel."

(Accord, Strickland v. Washington (1984) 466 U.S. 668, 690-691;[3/] In re Hall (1981) 30 Cal.3d 408, 426; People v. Frierson (1979) 25 Cal.3d 142, 166.)

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3. (PETITIONER DID NOT INSERT FN. IN ORIGINAL TEXT.)

Although indicative, failure to investigate is not the only predicate upon which a claim of inadequate trial counsel representation may be sustained. In Pope the court adopted the (alternative) test of whether counsel "effectively suppl[ied] to a defendant those skills and legal knowledge which can reasonably be expected from any member of the bar. (Id., 23 Cal.3d at p. 421-424) The Court concluded the standard of reasonable competent representation affords a measurable guide for evaluating the quality of trial counsel's decision-making and held "Defense strategy and tactics which lawyers of ordinary training and skill in criminal law would not (consider) competent deny a criminal defendant the effective assistance of counsel, if some other action would have better protected a defendant and was reasonably foreseeable as such before trial. (Id at p. 424)

The Pope Court explains that "If the failure of a criminal defense counsel to perform his obligations to his client results in the withdrawal of a crucial or

potentially meritorious defense, the defendant has not had the assistance of counsel to which he is constitutionally entitled. A crucial defense is not necessarily one which, if presented, would result inexorably in a defendant's acquittal. (R)ather, explains the Court, by failing to obtain an adjudication of the stronger of two potential defenses, trial counsel deprives his client of constitutionally adequate assistance." (Id. at p. 425) Thus in sustaining his burden of showing that petitioner was rendered constitutionally inadequate trial counsel assistance, he must show:

> (1) That trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates.
>
> (2) That counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense.

Once a petitioner has met these burdens, the reviewing court must look to see if the record contained an explanation for the challenged aspect of representation. If it does, the court must inquire whether the explanation demonstrates that counsel was reasonably

competent and acting as a conscientious, diligent advocate. When the record shows that counsel has failed to research the law or investigate the facts in a manner of a diligent and conscientious (advocate,) the conviction should be reversed, since the defendant has been deprived of adequate (counsel). However, when the record on review sheds no light on why counsel acted or failed to act in the manner challenged, the case must be affirmed on (appeal) (as was done in the instant case), unless counsel was asked for an explanation and failed to provide one (which was not done in the (instant) case) or unless there simply could be no satisfactory explanation. (People v. Pope, supra, 23 Cal.3d 412, 425; Strickland v. Washington, 466 U.S. 668, 687, 80 L.Ed.2d 674. 693, 104 S.Ct. 2052; People v. Ledesma (1987) 43 Cal.3d 171, 215-217)

In the case at bar the Court of Appeal on direct review attempted a conjured possible explanation for defense counsel's omissions-for failing to move for the exclusion of prosecution psychiatrist's testimony

pertaining to petitioner's extra judicial statements obtained without the presence of counsel and without petitioner being admonished as to the right to counsel during the prosecution-psychiatric examination which was conducted surreptitiously; however, the explanation is so (specious) as to be tantamount to no explanation at all since there would be no need to attack the psychiatrist's credibility if the testimony was barred as a matter of law.

The Pope Court concluded "When the record on appeal of a criminal conviction does not illuminate the basis for the acts or omissions of defense counsel, a claim defense of ineffective assistance is more appropriately made in a petition for habeas corpus. In habeas corpus proceedings, there is an opportunity in an evidentiary hearing to have counsel fully describe his or her reasons for acting or failing to act in the manner complained of. For example, counsel may (explain) why certain defenses were or were not presented. Having afforded the trial attorney an opportunity to explain,

courts are in a position to intelligently evaluate whether counsel's acts or omissions were within the range of reasonable competence. (People v. Pope, supra, at p. 426)

With the above principles in mind, the court must determine whether petitioner received the kind of legal assistance to be expected of a reasonably competent attorney acting as a conscientious, diligent advocate. (People v. Pope, supra, p. 427)

In In re Spencer, supra, 63 Cal.2d 400, observed that "Althought the court-appointed psychiatrist, an agent of the court, does not necessarily seek to elicit incriminating statements for use by the prosecution . . . , he does question a defendant about the facts of the crime, and any incriminating statements of a defendant so procured may be utilized by the prosecution at the guilt trial."

The court concluded the fact that the purpose of the psychiatric interview is not to gather evidence for the prosecution serves to compound the unfairness of

the psychiatrist's testimony; an agent of the court in reality lulls a defendant into making incriminating statements that may be used against him at the guilt trial. The Court held that if the court-appointed psychiatrist's testimony as to petitioner's incriminating statements was to be admissible, petitioner was entitled to the presence of counsel during the psychiatric examination. (In re Spencer 63 Cal.2d at p. 410)

Petitioner's initial burden under Pope is to show that counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates. (Ibid., 23 Cal.3d at p. 425). In the instant case objectionable prosecution (psychiatric) testimony was allowed without any resistance from the defense. In a similar case (People v. Williams (1971) 22 (Cal.App.) 3d 34, 46-47) the Second (Appellate) District Court of Appeal held that the defendant in a homicide prosecution was deprived of adequate legal representation in a crucial stage of his trial, where there was no apparent motive for the killing and the defense

was that of 'totally diminished capacity,' where defense counsel failed to object to hearsay containing an insinuation as to a possible motive, where no motion to strike the testimony was made either at the time it was given or when the district attorney later attempted to use it as the basis for cross-examination of a psychiatrist who had testified favorably to the defense on direct examination, and where counsel again failed to bring the matter to the court's attention when the district attorney indirectly referred to the testimony in argument by suggesting speculation as to motive. The instant case is similar to the Williams Case in that testimony regarding the divorce action initiated by petitioner's deceased wife and that petitioner stood to lose a substantial part of his income as well as access to his children was offered as motive to establish "preexisting (reflection)" offered to establish premeditated murder. The point here, however is petitioner's uncounseled statements obtained surreptitiously by the prosecution psychiatrist was proper matter for exclusion under both In re Spencer, supra;

and People v. Williams, supra, but were not ordered suppressed simply because counsel failed to make the appropriate objection. The Court of Appeal on direct review made a specious effort to conjure a far fetched justification for defense counsel's inaction alluding to the possibility counsel opted to attack the credibility of Dr. Lowe by subjecting him to vigorous cross-examination. This reasoning is marred since the obvious, easiest, swiftest, and most effacious method of dealing with Dr. Lowe would have been to suppress the testimony and be done with it. Such would have been expected of an attorney performing conscientiously as advocate.

Failure of defense counsel to interpose of Spencer objection to the prosecution psychiatrist testimony prejudicially resulted in the withdrawal of a potentially meritorious defense of diminished capacity defense to the same extent found in People v. Williams, supra.

In the instant case, petitioner put on psychiatric evidence indicating that he'd acted without malice. However, this was rebutted by the improper testimony

of Dr. Lowe, the prosecution's psychiatrist who interviewed petitioner without the presence of any defense counsel. Petitioner never waived the right to have defense counsel presence during the interview with Dr. Lowe which was conducted surrepitiously without the presence of counsel for the defense.

ORDER DENYING WRIT OF HABEAS CORPUS

No. S004531

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

IN RE OWEN DWAYNE NUNNEMAKER

ON

HABEAS CORPUS

Petition for writ of habeas corpus DENIED.

Original Signed
Acting Chief Justice

SUPREME COURT FILED: April 7, 1988
Lawrence P. Gill, Clerk

FILED: December 9, 1988
William L. Whittaker
Clerk, U.S. District Court
Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OWEN DUANE NUNNEMAKER Petitioner, v. EDDIE YLST, Respondent.	No. C-88-1828 TEH **ORDER**

This matter comes before the court on petitioner's petition for a writ of habeas corpus. After being convicted of first degree murder, petitioner was confined to the California Medical Facility at Vacaville. Petitioner contends that he is unlawfully confined because 1) statements he made to a prosecution psychiatrist were obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), and were erroneously admitted at trial, 2) his attorney was incompetent for

failing to object to the introduction of the psychiatrist's testimony, 3) the evidence introduced at trial was insufficient to support a verdict of first degree murder, and 4) the prosecutor's actions constituted prejudicial misconduct. Having reviewed the papers and the record in this case and good cause appearing, the petition is denied for the reasons set forth below.

DISCUSSION

I. Whether this Court is Barred from Reviewing Petitioner's Claim that his Statements to a Prosecution Psychiatrist were Erroneously Admitted.

Under California law, the failure to make a specific and timely objection at trial to the testimony of a prosecution psychiatrist who examined the defendant without admonishing him of his rights under Miranda, bars the issue from later appeal. People v. Bennett, 60 Cal.App.3d 112, 116 (1976). In petitioner's case, defense counsel objected to certain statements made by the prosecution psychiatrist, but failed to raise the issue that the entire testimony was based on an interview which violated petitioner's rights under Miranda and the

fifth and fourteenth amendments. Consequently, this issue was never raised on appeal to the California Court of Appeals or the California Supreme Court.

Federal courts require that a state prisoner exhaust the remedies available in state courts before presenting a habeas corpus claim for federal review. 28 U.S.C. Sections 2254(b),(c); Rose v. Lundy, 455 U.S. 509 (1982); McNeeley v. Arave, 842 F.2d 230, 231 (9th Cir. 1988). The purpose of the exhaustion requirement is to provide the highest state court with a fair opportunity to rule on the merits of each and every issue petitioner seeks to raise in federal court. Granberry v. Greer, 107 S.Ct. 1671, 1675 (1987). Where, because of a procedural default, the state has not been afforded this opportunity, federal courts will hear a claim only if the petitioner can show both cause for the procedural default and actual prejudice. Engle v. Isaac, 456 U.S. 107, 129 (1982), aff'g Wainwright v. Sykes, 433 U.S. 72 (1977). Cause for procedural default will only be found when a "constitutional claim is so novel that its legal

basis is not reasonably available to counsel." Reed v. Ross, 468 U.S. 1 (1984). Where a claim is as well known and frequently litigated as Miranda, counsel's decision not to raise it will only constitute cause for procedural fault if counsel's assistance is found to have been ineffective. Engle, 456 U.S. at 134; Murray v. Carrier, 477 U.S. 477, 492 (1986). As discussed below, this court rejects petitioner's contention that his trial counsel was ineffective.

Thus, in deference to the state courts and the laws of judicial comity, this court is barred from considering petitioner's claim that the statements he made to the prosecution psychiatrist were elicited in violation of Miranda and his fifth and fourteenth amendment rights and were erroneously admitted at trial.

II. Whether Trial Counsel's Failure to Object to the Testimony of the Prosecution Psychiatrist Deprived Petitioner of the Effective Assistance of Counsel.

To prove ineffective assistance of counsel, petitioner must allege that counsel made specific errors so serious that he was not acting as 'counsel' guaranteed by the

sixth amendment and thus, that the proper functioning of the adversarial system and the reliability of the trial were undermined. Strickland v. Washington, 466 U.S. 668 (1984). This court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct. Id. at 668.

Petitioner contends that he was deprived of the effective assistance of counsel because his trial counsel failed to object to the admission of the prosecution psychiatrist's testimony. Petitioner states that defense counsel could have avoided making numerous objections to specific aspects of the prosecution psychiatrist's testimony by objecting to the entire testimony on the grounds that petitioner was not warned that he could remain silent, that any statements made could be used against him or that he had the right to consult an attorney. See Miranda v. Arizona, 384 U.S. 436; see also Estelle v. Smith, 451 U.S. 454, 461-69 (1981) (defendant must be warned that he has a right to remain silent before being questioned by a psychiatrist

and has a right to consult with an attorney about his participation in the exam).

However, the efficacy of counsel's tactics is not an issue for this court. See Bashor v. Risley, 730 F.2d 1228, 1241 (9th Cir. 1984), cert. denied, 469 U.S. 838 (1984); see also United States v. Mayo, 646 F.2d 369, 375 (9th Cir. 1980), cert. denied, 545 U.S. 1127 (1981); see also Jones v. Barnes, 463 U.S. 745 (1983) (defense counsel has no constitutional duty to raise every nonfrivolous issue requested by defendant). Counsel's vigorous objections to specific aspects of the psychiatrist's testimony clearly establish the presence of an adversarial element at petitioner's trial. Defense counsel was clearly acting as the 'counsel' guaranteed petitioner by the sixth amendment.[1/]

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1. Petitioner claims that, under Townsend v. Sain, 372 U.S. 293 (1963), he is entitled to an evidentiary hearing to determine why defense counsel did not move to exclude the prosecution psychiatrist's testimony. Townsend does not stand for such a proposition and such a hearing is not appropriate in this case.

Accordingly, this court finds that petitioner was not denied the effective assistance of counsel.

III. Whether the Evidence set Forth at Trial was Sufficient to Sustain a Conviction of First Degree Murder.

This court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). Murder is the unlawful killing of another with malice aforethought. Cal. Penal Code Section 188 (West's 1988). To sustain a conviction of first degree murder the prosecutor must have presented sufficient evidence so that a reasonable jury might find that the murder was willful, deliberate, and premeditated. Cal. Penal Code Section 189 (West's 1988).

Petitioner contends that the evidence produced at trial does not support a finding that he committed first degree murder. It is unclear whether he claims that a rational jury could not have found that the killing was

done with malice (required for both first and second degree murder) or that a rational jury could not have found that the killing was wilful, deliberate and premeditated (the additional elements required for first degree murder). However, after careful review of the record, this court finds that a rational jury could have reasonably found all of these elements.

Malice may be implied when the killing proximately resulted from an act, the natural consequences of which are dangerous to life, and the act was deliberately performed by a person who acted with conscious disregard for life. People v. Mattison, 4 Cal.3d 177, 182-183 (1971); People v. Phillips, 64 Cal.2d 574, 587 (1966); see also Jackson v. Superior Court of City and County of San Francisco, 62 Cal.2d 521 (1965) (malice may be implied from assault with a dangerous weapon). The words willful, deliberate and premeditated should be construed in their ordinary dictionary meaning. People v. Orabuena, 56 Cal.App.3d 540 (1975). They refer to the mental state of someone who carefully

weighs the course of action he is about to take and chooses to kill the victim after considering the reasons for and against it. People v. Fusselman, 46 Cal.App.3d 289 (1975). The jury may infer premeditation and deliberation from facts about how and what defendant did prior to the actual killing, the defendant's prior relationship and/or conduct with the victim, and the nature of the killing. People v. Anderson, 70 Cal.2d 15, 26-27 (1968).

The prosecution presented ample evidence from which a rational jury could have found malice, and willful, deliberate and premeditated intent to kill. The record showed that petitioner and his wife were estranged at the time of the killing, that petitioner's attempts at reconciliation had failed, and that he had been deprived of the companionship of his children. There was also evidence in the record to indicate that on May 31, 1975, petitioner armed himself with a pistol and extra ammunition, told a friend that he was going to put more notches on his gun, drove to his estranged

wife's home and shot her in the chest. Petitioner claims that he did not intend to shoot her, but that the gun discharged during a struggle. However, two eyewitnesses testified that he shot his wife intentionally, from three feet away. There was also evidence that after the shooting he cut the telephone cord and refused to allow a doctor to be called.

This evidence, along with the other evidence in the record, supports a rational jury's conclusion that petitioner killed his wife with willful, deliberate, premeditated and malicious intent.

IV. Whether this Court is Barred from Reviewing Petitioner's Claims of Prosecutorial Misconduct and Improper Admission of Testimony.

Petitioner contends that the prosecution committed misconduct by misstating the evidence, by inducing witnesses to testify as it wished and by mischaracterizing petitioner. However, petitioner failed to object or request a curative admonition at trial. These steps are required by state law, in order to preserve the grounds

for reversal. People v. Green, 27 Cal.3d 1, 27-36 (1980). As a result of this procedural default, these issues were not raised on appeal to the state courts and, as explained above, in the absence of cause and prejudice for the default, this court is precluded from considering the claim. See Wainwright v. Sykes, 433 U.S. 72 (1977). Here, where petitioner received the effective assistance of counsel, failure to object at trial is not cause for procedural default. Accordingly, this court is barred from considering petitioner's claim.

Petitioner also contends that he was entitled to a hearing on the ability of two allegedly emotionally disturbed witnesses to testify. However, petitioner failed to preserve this issue for further state review when it was not raised on appeal. Once again, petitioner's procedural default is without cause and this court is barred from reviewing his claim by way of federal habeas corpus.

CONCLUSION

In sum, this court is barred by petitioner's procedural default from reviewing petitioner's claims that his Miranda and fifth and fourteenth amendment rights were violated by the admission of the prosecution psychiatrist's testimony at trial. Secondly, defense counsel's failure to object to the admission of the psychiatrist's testimony did not deprive petitioner of the effective assistance of counsel. Thirdly, this court finds that the evidence was sufficient to support a rational jury's conclusion that that petitioner willfully and maliciously killed his wife after premeditation and deliberation. Finally, petitioner's procedural defaults at trial and on appeal respectively, preclude this court from considering his claims that the prosecutor committed misconduct and that the testimony of two witnesses was erroneously admitted.

Accordingly, and good cause appearing, petitioner's petition for habeas corpus is HEREBY DENIED.

IT IS ORDERED.

DATED: December 9, 1988

THELTON E. HENDERSON
UNITED STATES DISTRICT COURT

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Owen Duane Nunnemaker, Petitioner-Appellant, v. Eddie S. Ylst Respondent-Appellee.	) No. 89-15050) D.C. No.) CV 88-1828) TEH)) ORDER AND) AMENDED) OPINION)

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Submitted November 17, 1989*/
San Francisco, California

Filed February 21, 1990
Amended May 25, 1990

Before: Jerome Farris, Harry Pregerson and
Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Pregerson

SUMMARY

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*. The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

HABEAS CORPUS

Affirming in part and reversing in part a judgment of the district court, the court held that a state procedural default bars federal habeas corpus review only if the last state court clearly and expressly states that its judgment rests on a state procedural bar.

Petitioner California State prisoner Owen Nunnemaker appealed the district court's dismissal of his petition for habeas corpus filed under 28 U.S.C. § 2254. A jury convicted Nunnemaker of first degree murder. At trial, defense counsel made specific objections to certain statements made by the state's psychiatrist, but failed to challenge the entire testimony on the grounds that it was based on an interview conducted in violation of Nunnemaker's Fifth and Sixth Amendment rights. On direct appeal, Nunnemaker raised these federal constitutional challenges for the first time. Affirming the conviction, the state appellate court expressly avoided these challenges and held that failure to interpose an objection during trial precluded

consideration on review. The California Supreme Court denied Nunnemaker's petition for hearing without comment or case citation. After Nunnemaker's habeas corpus petitions were denied by the state courts, the district court also denied his habeas petition because it did not make clear that he had exhausted all state remedies. Nunnemaker then filed a second petition for habeas relief in the California Supreme Court, and that petition was denied. The district court denied Nunnemaker's second petition holding that his state procedural default barred review of the Fifth and Sixth Amendment challenges to the psychiatrist's testimony.

[1] Under the Supreme Court's recent decision in *Harris v. Reed*, 109 S.Ct 1038 (1989), a procedural default bars review in federal habeas proceedings only if the last state court ruling on a case states the basis of its decision. Procedural default alone will not bar federal review; the state court's ruling must have been based at least in part on an adequate and independent state procedural rule. [2] In this case, the California

Supreme Court was the last state court to render judgment. From the record before it, the Court could not say that the California Supreme Court's denial of Nunnemaker's final petition, without cause or comment, was based on a procedural default rather than on the underlying merits of Nunnemaker's claims. The rationale and plain language of *Harris* require that where a state supreme court does not plainly state in its summary denial of an original habeas petition that its ruling rests on a state procedural bar, federal review is not precluded.

[3] Because Nunnemaker did show that his trial counsel's performance was not within the range of competence demanded of attorneys in criminal cases, the court affirmed that part of the district court's ruling.

COUNSEL

Juliana Drous, San Francisco, California, for the petitioner-appellant.

Ronald E. Niver, Deputy Attorney General, San Francisco, California, for the respondent-appellee.

ORDER

The opinion is *Nunnemaker v. Ylst*, No. 89-15050, slip op. (9th Cir. Feb. 21 1990), is amended as follows:

Slip op. at 1842, line 12

The sentence beginning with "Here, the California Supreme Court" is deleted and replaced by the following sentence:

Here, the California Supreme Court was the "last state court to render judgment in the case" because Nunnemaker's last filing with that court was an *original habeas petition* raising again his Fifth Amendment challenge to the state psychiatrist's testimony.

Slip op. at 1842, footnote 4

The first sentence in the footnote is deleted. The following sentence is added after the last sentence in the footnote:

Our holding is expressly limited to cases in which the California Supreme Court denies, without comment or case citation, original habeas petitions.

Slip op. at 1843, footnote 5

The original footnote is deleted and replaced by the following footnote:

In *Ellis v. Lynaugh*, 873 F.2d 830, 838 (5th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 419 (1989), the Fifth Circuit held that, where a state trial court denied habeas relief on state procedural default grounds but the appellate court "denied relief without written order," federal review of the petitioner's claims was barred by the procedural default. It is not clear, however, whether the state appellate court in *Ellis v. Lynaugh* summarily *affirmed* the trial court's denial of habeas relief on petition for review, *see* Tex. Crim. Proc. Code Ann. § 4.04.2 (1987), or denied an *original habeas petition. See* Tex. Crim. Proc. Code Ann. § 4.04.1 (1987); *see also Ellis v. Lynaugh*, 873 F.2d at 838. Because our decision in this case rests on the fact that the California Supreme Court summarily denied Nunnemaker's *original habeas petition*, we express no opinion on the Fifth Circuit's decision in *Ellis v. Lynaugh*.

The panel has voted to deny the petition for rehearing and to reject the suggestion of rehearing en banc. The full court has been advised as to the suggestion of rehearing en banc, and no judge has requested a vote on en banc consideration.

The petition for rehearing is DENIED and the suggestion of rehearing en banc is REJECTED.

OPINION

PREGERSON, Circuit Judge:

Owen Duane Nunnemaker, a California state prisoner, appeals the district court's dismissal of his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. A California jury convicted Nunnemaker of first degree murder under Cal. Penal Code § 187. At trial, a psychiatrist called by the state prosecutor gave testimony on statements made by Nunnemaker in a post-arrest interview. Nunnemaker contends that the admission of the psychiatrist's testimony violated his Fifth and Sixth Amendment rights, that his Fifth and

Sixth Amendment claims are not barred by procedural default, and that he received ineffective assistance of counsel. In light of the Supreme Court's recent decision in *Harris v. Reed*, ___ U.S. ___, 109 S.Ct. 1038 (1989), decided after the district court ruled on Nunnemaker's petition, we reverse in part and remand the case to the district court for consideration of Nunnemaker's Fifth and Sixth Amendment challenges to his conviction. We affirm the district court's judgment that Nunnemaker was not deprived to effective assistance of counsel.

BACKGROUND

On January 30, 1976, Owen Duane Nunnemaker was convicted in California state court of first degree murder. He was sentenced to life in prison.

At trial, Nunnemaker introduced expert testimony to establish capacity defense then available under California law. To rebut this testimony the state prosecutor called as a witness a psychiatrist who interviewed Nunnemaker two days after his arrest. At the time of the interview, Nunnemaker was told that the

psychiatrist was working for the prosecution. Nunnemaker, however, was not informed that he had the right to remain silent and the right to an attorney. At trial, defense counsel made several specific objections to certain statements made by the state's psychiatrist, but failed to challenge the entire testimony on the grounds that it was based on an interview conducted in violation of Nunnemaker's Fifth and Sixth Amendment rights.

On direct appeal to the California Court of Appeal, Nunnemaker raised for the first time his federal constitutional challenges to the testimony of the state's psychiatrist. Affirming the conviction, the state appellate court expressly avoided these challenges and held that "the failure to interpose an objection during trial preclude[d its] consideration on review." The state appellate court, however, considered on the merits -- and rejected -- Nunnemaker's ineffective assistance of counsel claim. On direct appeal, the California Supreme Court denied Nunnemaker's petition for

hearing, without comment or case citation, on September 27, 1978.

Nunnemaker petitioned the California courts for a writ of habeas corpus. In his habeas petitions, he raised, among other claims, his federal constitutional challenges to the testimony of the state psychiatrist and his ineffective assistance of counsel claim. His petitions were denied.[1/]

Nunnemaker then filed a habeas petition under 28 U.S.C. § 2254 in the United States District Court for the Northern District of California. The district court dismissed the petition without prejudice because the petition did not make clear whether all state remedies had been exhausted.[2/] Nunnemaker filed a second

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1. The Sonoma County Superior Court denied Nunnemaker's petition on February 25, 1985. The California Court of Appeal for the First Circuit denied his petition in late 1985. The California Supreme Court denied his first petition on December 3, 1986, and his second petition on April 7, 1988.

2. The district court stated:

> The petition is not entirely clear as to the procedural history of this matter. Petitioner

petition for habeas relief in the California Supreme Court, arguing again that his statements to the state

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states that none of his claims were raised by way of direct appeal in the California courts. However, petitioner did present these and other claims to the California Court of Appeal and Supreme Court by way of a habeas petition. The California Supreme Court denied the petition, citing *In Re Waltreus,* 62 Cal.2d 218, 225 (1965) and *In Re Swain*, 34 Cal.2d 300, 304 (1949). These citations are cryptic. *Walthus* holds that arguments rejected on appeal will not be reviewed again in habeas; thus the implications of this citation contradict petitioner's assertion that he did not raise the claims on appeal. *Swain,* in contrast, holds that habeas claims not pleaded with sufficient particularity must be dismissed without prejudice. This latter citation implies that at least some of petitioner's claims were not presented on appeal, and the California Supreme Court declined to consider their merits on procedural grounds. As to any claims raised on appeal to the state and rejected on the merits, petitioner has exhausted his state remedies and this court can hear his habeas petition.... However, any claims not raised on appeal, and whose merits the state courts have not considered on habeas, must be dismissed....

District Court Ordered, September 8, 1987, at 2.

prosecution psychiatrist were "clearly inadmissible," and stating in greater particularity his claim of ineffective assistance of counsel. That petition was also denied, without comment or case citation, by the California Supreme Court on April 7, 1988.

Nunnemaker filed another federal habeas petition. The district court issued an Order to Show Cause on July 8, 1988. On December 9, 1988, the district court denied the petition. The court held that Nunnemaker's state procedural default barred review of the Fifth and Sixth Amendment challenges to the prosecution's psychiatrist testimony, and that Nunnemaker had not been deprived of effective assistance of counsel.

Nunnemaker filed a timely notice of appeal. This court has jurisdiction over the district court's final order under 28 U.S.C. § 2253.

STANDARD OF REVIEW

We review the district court's denial of habeas corpus relief de novo. *McKenzie v. Risley*, 842 F.2d 1525, 1531 (9th Cir.) (en banc), *cert. denied*, 109 S.Ct.

250 (1988). The question whether Nunnemaker was deprived of effective assistance of counsel is a mixed question of fact and law reviewed de novo. *Strickland v. Washington*, 466 U.S. 668, 698 (1984); *Deutscher v. Whitley*, 884 F.2d 1152, 1155 (9th Cir. 1989).

DISCUSSION

I. Procedural Bar

This case presents the issue whether the California Supreme Court's denial of an original petition for writ of habeas corpus without comment or case citation constitutes a "plain statement" sufficient to establish the procedural default bar of federal habeas review under the Supreme Court's recent decision in *Harris v. Reed*, 109 S.Ct. 1038. We hold that it does not.

The Supreme Court has held that a state prisoner barred by procedural default from raising a federal constitutional claim in state court "could not litigate that claim in a § 2254 habeas corpus proceeding without showing cause for and actual prejudice from the default." *Engle v. Isaac*, 456 U.S. 107, 110 (1982) (citing

Wainwright v. Sykes, 433 U.S. 72 (1977)). In *Harris v. Reed*, the Supreme Court applied this rule, but held that "a federal claimant's [state] procedural default precludes federal habeas review . . . only if the *last* state court rendering a judgment in the case rests its judgment on the procedural default." 109 S.Ct. at 1043 (emphasis added.) The Court explained that *Wainwright v. Sykes'* holding that a state procedural default may bar federal habeas review is based on the adequate and independent state ground doctrine, under which the Court "will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Id.* at 1042 (citing *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Murdock v. City of Memphis*, 20 Wall. 590, 635-36 (1875)). The Court in *Harris* applied the "'plain statement' rule" of *Michigan v. Long*, 436 U.S. 1032, 1042 and n.7, to state prisoner cases on federal habeas review, and held that

"a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Harris v. Reed,* 109 S.Ct. at 1043 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985)).

[1] Under *Harris*, then, a procedural default bars review in federal habeas proceedings only if the last state court ruling on a case states the basis of its decision. Procedural default alone does not bar federal review; the state court's ruling must have been *based,* at least in part, on an "adequate and independent" state procedural rule. *Harris v. Reed,* 109 S.Ct. at 1042. *Harris* undertakes to resolve the problem -- often faced by district courts -- of discerning from an ambiguous state court ruling the basis of a decision to deny habeas relief to a state prisoner raising federal constitutional claims. The plain statement requirement ensures that federal courts will decline to review state prisoners'

federal constitutional claims only where required by the interests of comity.[3]

[2] Here, the California Supreme Court was the "last state court to render judgment in the case" because Nunnemaker's last filing with that court was an *original habeas petition* raising again his Fifth Amendment challenge to the state psychiatrist's testimony.[4] That

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3. Where comity does not require it, federal courts should not deny review. "[T]he federal courts . . . have a primary obligation to protect the rights of the individual that are embodied in the Federal Constitution." *Harris v. Reed*, 109 S.Ct. at 1045 (Stevens, J., concurring).

4. Under California law, a state prisoner seeking collateral review of his or her conviction may file separate, independent habeas petitions in the superior court, court of appeal, and supreme court. Cal. Penal Code § 1475. In addition, however, a state prisoner whose habeas petition is denied in the court of appeal may file a petition for review of that denial in the California Supreme Court. Cal. Penal Code § 1506. In *McQuown v. McCartney*, 795 F.2d 807, 809-10 (9th Cir. 1986), we held that when a habeas case is before the California Supreme Court on a *petition for hearing,* rather than as an *original habeas petition*, a summary denial by the state supreme court is not a decision on the merits of the petition. *See also Tacho v. Martinez*, 862 F.2d 1376, 1378-80 (9th Cir. 1988) (applying *McQuown* and holding that the Arizona Supreme Court's *denial of review* of a trial court denial of habeas relief without case citation or

court did not clearly and expressly state its reliance on Nunnemaker's procedural default when it denied his final habeas petition. The petition raised Nunnemaker's objection to the testimony of the state's psychiatrist and Nunnemaker's ineffective assistance of counsel claim. From the record before us, we cannot say that the California Supreme Court's denial of Nunnemaker's final petition, without comment or case citation, was based on

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comment was not a decision on the merits.) *Cf. Thompson v. Procunier*, 539 F.2d 26, 28 (9th Cir. 1976) ("Where a petition for a writ of habeas corpus presenting a federal constitutional question is denied by a state court with no reason given, we will assume that the state court has had an opportunity to pass upon the merits of the issue and has resolved it against the petitioner.").

McQuown does not affect the present case, because the California Supreme Court denied Nunnemaker's *original habeas petition* on April 7, 1988. That ruling was a "judgment" under *Harris*, and was the last rendered by a state court in Nunnemaker's case. We do not now address the question whether, in light of *Harris v. Reed*, the California Supreme Court's summary denial of a *petition for hearing* on a denial of habeas relief based on a procedural rule bars federal habeas review. Our holding is expressly limited to cases in which the California Supreme Court denies, without comment or case citation, original habeas petitions.

a procedural default rather than on the underlying merits of Nunnemaker's claims. The rationale and plain language of *Harris*, require that, where, as here, a state supreme court does not plainly state in its summary denial of an original habeas petition that its ruling rests on a state procedural bar, federal habeas review is not precluded.[5]

In fact, the Supreme Court discussed in *Harris* the issue now before us. The Court addressed concerns raised over the burden the plain statement requirement

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5. In *Ellis v. Lynaugh*, 873 F.2d 830, 838 (5th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 419 (1989), the Fifth Circuit held that, where a state trial court denied habeas relief on state procedural default grounds but the appellate court "denied relief without written order," federal review of the petitioner's claims was barred by the procedural default. It is not clear, however, whether the state appellate court in *Ellis v. Lynaugh* summarily *affirmed* the trial court's denial of habeas relief on petition for review, *see* Tex. Crim. Proc. Code Ann. § 4.04.2 (1987), or denied an *original habeas petition*. *See* Tex. Crim. Code Ann. § 4.04.1 (1987); *see also Ellis v. Lynaugh*, 873 F.2d at 838. Because our decision in this case rests on the fact that the California Supreme Court summarily denied Nunnemaker's *original habeas petition*, we express no opinion on the Fifth Circuit's decision in *Ellis v. Lynaugh*.

would place on state courts ruling on habeas petitions. The Court stated that "a state court that wishes to rely on a procedural bar rule in a one-line *pro forma* order easily can write that 'relief is denied for reasons of a procedural default.'" *Harris v. Reed,* 109 S.Ct. at 1044 n.12. The California Supreme Court did not do that in this case.

The district court carefully reviewed Nunnemaker's habeas petitions, but did not have the benefit of the Supreme Court's later clarification of federal habeas law in *Harris*. We hold that the district court was not barred from reviewing Nunnemaker's federal constitutional claims concerning the testimony of the state's psychiatrist.

II. Ineffective Assistance of Counsel

Nunnemaker also contends that he was deprived of effective assistance of counsel, and that federal habeas relief should be granted for that reason.[6] This Sixth

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6. Nunnemaker raised this claim on direct appeal in the state court proceedings, and the state appellate court decided the merits of the claim. The state has made no

Amendment ineffective assistance of counsel claim is based on Nunnemaker's trial counsel's failure to object to the admission of the state psychiatrist's testimony on Fifth and Sixth Amendment grounds. The district court concluded that "[d]efense counsel was clearly acting as the 'counsel' guaranteed by the Sixth Amendment." We agree.

An ineffective assistance of counsel claim has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland v. Washington, 466 U.S. 668, 687 (1984). A convicted defendant complaining of the ineffectiveness of counsel's assistance must show that counsel's

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argument that this claim was not properly before the district court. The district court correctly reached the ineffective assistance claim in the its review of Nunnemaker's habeas petition.

representation "fell below an objective standard of reasonableness." *Id.* at 688.

The trial record demonstrates that Nunnemaker's counsel vigorously objected to parts of the psychiatrist's testimony on various grounds. Further, because the state's psychiatrist was subject to potentially damaging cross examination, trial counsel's decision to allow the testimony, make specific objections, and impeach the witness on bias and credibility grounds may well have been a sound trial tactic.[7]

[3] Nunnemaker has not shown that his trial counsel's performance "was not 'within the range of competence demanded of attorneys in criminal cases.'" *Id.* at 687 (quoting *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970)).

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7. This was the conclusion reached by the state appellate court on direct appeal.

CONCLUSION

For these reasons, the judgment of the district court is AFFIRMED in part and REVERSED and REMANDED in part.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

November 5, 1990

Re: 90-68 - Eddie S. Ylst, Warden v. Owen Duane Nunnemaker

The court today entered the following order in the above stated case:

"The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted."

COPY

Supreme Court, U.S.
FILED
DEC 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-68

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

EDDIE S. YLST, WARDEN

Petitioner,

v.

OWEN DUANE NUNNEMAKER

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether *Harris* v. *Reed*, 489 U.S. 255 (1989), holds that a state high court's denial of habeas corpus relief without opinion, which denial is not a decision on the merits under state law, forgives a procedural default expressly claimed by an intermediate state appellate court on direct review.

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No. 90-68

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

EDDIE S. YLST, WARDEN

Petitioner,

v.

OWEN DUANE NUNNEMAKER

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATE COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, first reported at 896 F.2d 1200 (1990), was amended upon the denial of rehearing. 904 F.2d 473. A copy of the amended opinion appears in the Joint Appendix at J.A. 128-149. The unreported order of the District Court denying the petition for writ of habeas corpus appears in the Joint Appendix at J.A. 115-127. The opinion of the California Court of Appeal, First Appellate District, also unreported, appears in the Joint Appendix at J.A. 1-25.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 21, 1990. Rehearing was denied on May 25, 1990. A petition for writ of certiorari was timely filed on July 9, 1990. 28 U.S.C. § 2101(c); Supreme Court Rule 13.1, 13.4. On November 5, 1990, this Court granted certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2254 of Title 28, United States Code, provides in pertinent part:

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

STATEMENT

1. By an information filed in Sonoma County Superior Court on August 21, 1975, respondent Owen Duane Nunnemaker was charged with murder and assault with a deadly weapon, in violation of California Penal Code sections 187 and 245(a). It was further alleged that during the commission of both offenses, respondent was armed with, and did use, a firearm, in violation of California Penal Code sections 12022 and 12022.5. On January 30, 1976, the jury found respondent guilty of murder in the first degree, and further found that he was armed with, and did use, a deadly weapon during the commission of this offense. Respondent was sentenced to life imprisonment.

On June 30, 1978, the California Court of Appeal for the First Appellate District modified and, as modified, affirmed the judgment of conviction. (J.A. 1-25.) On September 27, 1978, the California Supreme Court denied respondent's petition for hearing. (J.A. 26.)

After a period of almost seven years, respondent sought collateral relief in state courts by way of petitions for writs of habeas corpus. On February 25, 1985, the Sonoma County Superior Court denied his petition. On April 29, 1985, the California Court of Appeal denied his petition without opinion. The California Supreme Court denied his first petition in that court on December 3, 1986. (J.A. 82.)

On September 7, 1987, and December 3, 1987, respectively, the United States District Court for the Northern District of California dismissed respondent's

petitions for writs of habeas corpus for failure to exhaust state remedies. (J.A. 83-87; 88-90.)

On April 7, 1988, the California Supreme Court denied respondent's second petition for writ of habeas corpus in that court. (J.A. 114.)

Upon another petition for writ of federal habeas corpus, the District Court issued an order to show cause on July 8, 1988, and denied the petition on December 9, 1988. (J.A. 115-127.)

Respondent appealed to the United States Court of Appeals for the Ninth Circuit. On February 21, 1990, the court affirmed in part and reversed in part the judgment of the district court, with directions to consider the merits of respondent's federal claim. On May 25, 1990, the court of appeals denied rehearing and amended its opinion. 904 F.2d 473.

2. The opinion of the California Court of Appeal summarizes the events which led to respondent's conviction for the murder of his wife:

"In the afternoon of May 31, 1975 [respondent Owen Duane Nunnemaker] -- armed with an automatic weapon -- forcibly entered the home of his estranged wife, Alice, and following a struggle fired a single shot from a distance of three feet mortally wounding the victim. As witnesses to the shooting attempted to assist the fallen victim, the [respondent] restrained them from summoning aid and cut the telephone cord preventing its use to call an ambulance. One of the foster children, Linda (age 16 years), managed to exit the home and called the sheriff's office on a neighbor's telephone. When the officers arrived, Linda informed them of the shooting. After all but one of the children had exited, the officers entered

the home and observed the victim lying on the floor of the living room and another foster child, Sherry (age 17 years), at her side. During the search, they discovered the [respondent] in a rear bedroom where apparently he had just telephoned the sheriff's office requesting an ambulance. [Respondent] offered no resistance and was placed under arrest and searched; several rounds of nine (9) millimeter ammunition were found in [his] pocket; [respondent] led the officers to his car parked in front of the house where they observed the weapon used lying on the front seat.

"At trial, Linda, Sherry and Mrs. Brower testified that the [respondent] appeared sober and calm immediately after the shooting; the three arresting officers gave similar testimony concerning their observations of [respondent] at the time of his arrest.

"The [respondent] testified that he went to the home for the purpose of delivering a birthday present and to visit his children, which permission was refused by the victim. That as he and the victim were standing at the door, the victim suddenly 'launched herself toward me.' Thereafter, he could not recall any of the ensuing events until he walked to his car with his son Shawn and gave him the birthday present; he then noticed he was holding a gun in his hand which he placed in his car. Upon reentering the house, and thereafter seeing his wife lying on the floor, he telephoned the sheriff's office from the rear bedroom. [Respondent] denied that he had intentionally shot his wife whom he loved deeply.

"The defense introduced psychiatric testimony in support of a diminished capacity defense; on rebuttal, the

prosecution presented conflicting psychiatric testimony." (J.A. 3-6 [fns. omitted].)

SUMMARY OF ARGUMENT

Convicted of the first degree murder of his wife, respondent Owen Duane Nunnemaker challenged his conviction in the California Court of Appeal on the ground that his statement to a prosecution psychiatrist was elicited in violation of *Miranda* v. *Arizona,* 384 U.S. 436 (1966). The court of appeal refused to address this claim in obedience to the legislative prohibition against considering evidentiary claims not raised at trial. The California Supreme Court denied a petition for hearing.

Almost a decade later, respondent again challenged the admissibility of the statement, this time by way of state habeas corpus. The state supreme court twice denied habeas petitions on this ground, the second time without comment or citation to authority. The Ninth Circuit held that the second denial was a rejection of the merits of respondent's *Miranda* claim and that it served to forgive a procedural default which the court of appeal had expressly invoked ten years earlier. Relying upon dictum in *Harris* v. *Reed*, 489 U.S. 255, 265 n. 12 (1989), the Ninth Circuit declared that the state high court's reliance upon a procedural rule for the denial of relief must be reflected by a "plain statement" in its order.

The Ninth Circuit has read *Harris* too broadly and has misapprehended California law. The "plain statement" rule of *Harris* presupposes that the federal habeas court is reviewing a state court's opinion, not its "silent" order denying relief. This Court's cases construing its

jurisdiction on direct review under 28 U.S.C. § 1257 teach that the significance of a silent order must be determined by reference to the law of the state. To the extent that it held that *Harris* compelled a presumption that the denial of relief by the California Supreme Court was a resolution of the merits, the Court of Appeals for the Ninth Circuit was plainly incorrect.

The court of appeals also reiterated the Circuit's misapprehension that under state law a silent denial of relief addressed the merits of the claim. In fact, it is a time-honored principle of California habeas corpus procedure that a denial of habeas relief without comment or case citation by a court, which otherwise has jurisdiction, is not a decision on the merits. When a petition for writ of habeas corpus is presented to the seven Justices of the California Supreme Court, each may have a separate reason for declining to issue the writ. When the supreme court denies habeas relief in the exercise of its original jurisdiction, it is not a determination of the merits of the petitioner's allegations. The *only* state *judgment* in this case -- the opinion of the court of appeal which affirmed respondent's conviction on direct review -- expressly and exclusively rested its rejection of respondent's *Miranda* claim upon his failure to raise the issue at trial.

Under the Ninth Circuit's opinion, a state prisoner who has failed, either inadvertently or intentionally, to raise an issue at trial or on direct appeal no longer need fear the forbidding test of cause and prejudice erected by *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). To open the doors of federal court, he need only file a petition for writ of habeas corpus in the state supreme court. If that court

denies relief without comment, as the California Supreme Court does hundreds of times each year, that denial will serve both to exhaust state remedies and to forgive the procedural default. To avoid such cynical manipulation of the post-conviction remedies provided by the state and federal systems, the state supreme court must alter its procedures drastically, providing an explanation for the denial of relief. That would place an intolerable strain upon the resources of this state's highest court.

It is no exaggeration to state that the lower court's opinion, if affirmed, will serve to eviscerate the salutary rule of *Wainwright* v. *Sykes* in this and all other states which permit their supreme courts to manage their dockets by summarily denying habeas corpus relief. Such a result was neither dictated nor authorized by *Harris* and is unnecessary to provide federal habeas review to prisoners who have in good faith attempted to comply with state procedural rules. To the extent that respondent was entitled to a "plain statement" of the reasons why state courts have declined to consider the merits of his claim, he received it over twelve years ago from the state court of appeal. The subsequent silence of the state courts has not forgiven that default.

ARGUMENT

THE "PLAIN STATEMENT" REQUIREMENT OF *HARRIS* v. *REED* DOES NOT APPLY TO "SILENT" DENIALS WHICH, UNDER STATE LAW, ARE NOT DECISIONS ON THE MERITS.

The question for decision is whether the Federal Habeas Corpus Act, as explicated by this Court, requires a conclusive presumption that the silent denial of habeas corpus by a state high court is a resolution of the merits of the prisoner's claim. The Ninth Circuit held that *Harris* v. *Reed*, 489 U.S. 255 (1989), requires such a presumption, which in this case forgave a procedural default expressly invoked by a state intermediate appellate court on direct review. As a result of the opinion of the Ninth Circuit, silent denials by state high courts, either on habeas or direct review, would have the unintended effect of waiving procedural defaults, even those which are jurisdictional and hence unwaivable. This unprecedented construction of the Federal Habeas Corpus Act, distorting the principles set forth in *Harris*, gives state prisoners a clear blueprint for circumventing state procedural requirements for the orderly litigation of federal claims. The mission of the Great Writ is to vindicate due process, not abolish state procedural rules. Petitioner therefore respectfully asks this Court to reverse the judgment of the Ninth Circuit.

A. Procedural and Factual Background

After respondent had been arrested for the murder of his wife on May 31, 1975, and before he was arraigned, he was questioned by a psychiatrist at the request of the prosecution. The psychiatrist told respondent that he represented the prosecution but did not advise him that he could remain silent or consult with an attorney during the interview. The psychiatrist did not testify during the prosecution's case-in-chief, but was called as a rebuttal witness after respondent had presented a defense of diminished capacity.[1/] Although respondent's trial counsel interposed several specific objections to certain statements which the psychiatrist made in his testimony, counsel did not challenge his right to testify on the grounds that his knowledge of respondent's mental state was based upon an interview conducted in violation of respondent's constitutional rights. (J.A. 14-18; 120; 135-136.) On January 30, 1976, the jury convicted respondent of the first degree murder of his wife.

On appeal, respondent contended that the interview violated his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and that his attorney rendered ineffective

1. The California Supreme Court had recognized the need for, and authorized the conduct of, interviews by prosecution psychiatrists of the defendants who subsequently raised a defense involving insanity or mental disease or defect at trial. *In re Spencer*, 63 Cal.2d 400, 46 Cal.Rptr. 753 (1965); *see also Estelle* v. *Smith*, 451 U.S. 454, 465 (1981).

assistance for failing to object to the introduction of the psychiatrist's testimony.[2/]

The state court of appeal declined to reach the merits of the *Miranda* claim, invoking the legislatively mandated contemporaneous objection rule that forecloses appellate review of the admissibility of evidence on grounds not asserted in the trial court. Cal. Evid. Code § 353(a). The ineffective assistance claim was rejected on the merits. The court found that defense counsel had a tactical reason for failing to object to the psychiatrist's testimony. (J.A. 17; 148.) The state supreme court denied respondent's petition for hearing on September 27, 1978. (J.A. 26.)

In 1985, respondent again challenged his conviction, this time by way of state habeas corpus. His petitions in the Sonoma County Superior Court and the California Court of Appeal were denied on February 25, 1985, and April 29, 1985, respectively. On May 22, 1986, he filed a petition in the California Supreme Court, raising as he did on direct appeal claims under *Miranda* and the right to effective assistance of counsel. On December 3, 1986, the state supreme court denied the petition.[3/]

2. He did not contend that the interview violated his rights under the Sixth Amendment.

3. The order cited, *inter alia, In re Waltreus,* 62 Cal.2d 218, 42 Cal.Rptr. 9 (1965), which states: "These arguments were rejected on appeal, and habeas corpus ordinarily cannot serve as a second appeal." *Id.* at 225, 42 Cal.Rptr. at 13.

Respondent then filed petitions for writs of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Northern District of California. On September 8, and December 3, 1987, the court dismissed the petition because it did not clearly establish exhaustion of state remedies. 904 F.2d at 474, J.A. 83-87; 88-90. On March, 1, 1988, respondent filed a second petition for habeas corpus relief in the state supreme court, alleging that his statements to the prosecution psychiatrist were inadmissible because obtained during interrogation when counsel was not present. Respondent "contend[ed] he was deprived of a fair trial as a result of defense counsel's failure to object to the testimony of the prosecution psychiatrist. . . ." (J.A. 98.) On April 7, 1988, the state supreme court again denied the petition, this time without comment or case citation. (J.A. 114.)

Respondent filed a second petition under 28 U.S.C. § 2254 in district court, which ordered petitioner to show cause on July 8, 1988, and denied the petition on December 9, 1988. The district court found that respondent's state trial court procedural default barred any review of the Fifth Amendment challenge to the testimony of the prosecution psychiatrist,[4/] and that respondent had not been deprived of effective assistance of counsel. (J.A. 115-127.)

On appeal to the Court of Appeals for the Ninth Circuit, the court affirmed the denial of relief on the

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4. Contrary to the assertion of the Ninth Circuit (904 F.2d at 475), respondent did not challenge his statement on Sixth Amendment grounds in the district court. That claim was made for the first time in the Ninth Circuit.

ineffective assistance claim, but reversed the denial of relief on the *Miranda* claim and remanded the matter to the district court with instructions to consider the merits of the latter claim. The court held that under *Harris* v. *Reed, supra*, "where, as here, a state supreme court does not plainly state in its summary denial of an original habeas petition that its ruling rests on a state procedural bars, federal habeas review is not precluded." 904 F.2d at 476 (fn. omitted).

B. **The Parameters of Procedural Default**

In *Fay* v. *Noia*, 372 U.S. 391 (1963), this Court acknowledged "that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies." *Id.* at 438. At the same time, however, the Court seemingly rejected categorically the proposition that a state procedural default which constitutes an adequate and independent state ground barring direct Supreme Court review under 28 U.S.C. § 1257 should also divest federal courts of jurisdiction to consider a federal claim in a petition for writ of habeas corpus under 28 U.S.C. § 2254. 372 U.S. at 399, 426-434. In *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), however, this Court held that, although a procedural bar did not defeat the jurisdiction of a federal habeas court, the prisoner's claim should be denied unless he could show cause for and actual prejudice from the default. *Id.* at 87.

The prisoner must show both cause and prejudice. *Murray* v. *Carrier*, 477 U.S. 478, 493-495 (1986); *Engle* v.

Isaac, 456 U.S. 107, 134 n. 43 (1982). An attorney's inadvertent failure to recognize the factual or legal basis for a claim does not constitute cause. *Carrier, supra*, at 487; *Engle, supra*, at 133-134. Rather, to establish cause the prisoner must show either (1) ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U.S. 668 (1984); or (2) the existence of "some objective factor" (*Carrier, supra,* at 488), such as (a) the unavailability to counsel of the factual or legal basis for the claim (*Reed* v. *Ross*, 468 U.S. 1, 16 [1984]), or (b) "'some interference by officials,' *Brown* v. *Allen*, 344 U.S. 443, 486 (1953), [which] made compliance impractical. . . ." *Carrier, supra*, at 388. In terms of prejudice, the prisoner "must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States* v. *Frady*, 456 U.S. 152, 170 (1982).

The requirement that the prisoner show cause for the procedural default must yield only to "the imperative of correcting a fundamentally unjust incarceration." *Engle,* 456 U.S. at 135. This Court has defined such an incarceration as one which is based upon the conviction of a factually innocent defendant as a result of a constitutional violation. *Carrier*, 477 U.S. at 495-496; *Smith* v. *Murray*, 477 U.S. 527, 537-539 (1986). "[I]n such an extraordinary case, . . . a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Carrier, supra*, at 496.

The *Sykes* requirement applies even to procedural defaults which otherwise foreclose consideration of constitutional error affecting the truthfinding function of

the trial. *Engle* v. *Isaac*, 456 U.S. at 129. It makes no difference that the procedural default occurred on appeal rather than at trial. *Murray* v. *Carrier*, 477 U.S. at 489-492. *Sykes* requires only that the state procedural rule be adequate and independent. *See Harris* v. *Reed,* 489 U.S. at 260.

A state procedural rule is not "adequate" unless it is ""strictly or regularly followed."" *Johnson* v. *Mississippi*, 486 U.S. 578, 587 (1988) (Citations omitted). "A basis of decision applied infrequently, unexpectedly, or freakishly may be inadequate, for the lack of notice and consistency may show that the state is discriminating against the federal rights asserted." *Prihoda* v. *McCaughtry*, 910 F.2d 1379, 1383 (7th Cir. 1990). A state ground is "independent" if it is not interwoven with federal law (*Ake* v. *Oklahoma*, 370 U.S. 68, 74-75 [1985]), and the state court actually relied upon it. *Ulster County Court* v. *Allen*, 442 U.S. 140, 152-154 (1979). Actual reliance, however, was not always clear from the state court's opinion. *Harris* v. *Reed, supra,* attempted to remedy this difficulty.

C. ***Harris* v. *Reed***

In *Harris*, the prisoner was convicted of murder and challenged his conviction on direct appeal, raising only the issue of the sufficiency of the evidence. The Appellate Court of Illinois affirmed. The prisoner then filed a petition for post-conviction relief in the Circuit Court, claiming for the first time that his trial counsel was ineffective. The Circuit Court dismissed the petition; the Appellate Court again affirmed.

The Appellate Court's order of affirmance adverted to the "well-settled" principle of state law that issues which could have been raised on direct appeal were waived and could not be litigated on a petition for post-conviction relief. The court then considered and rejected the merits of prisoner's ineffective-assistance claim.

Rather then seek review in the Illinois Supreme Court, the prisoner filed a petition for writ of habeas corpus in United States District Court, raising his ineffective counsel claim. The District Court found that the state court had noted but did not invoke a procedural default and rejected the claim on the merits. The Court of Appeals affirmed, but concluded that the Illinois Appellate Court relied, at least alternatively, upon the procedural default. For that reason, the Court of Appeals declined to reach the merits of the ineffective assistance claim. 489 U.S. at 257-259.

This Court reversed, holding that the state court opinion did not "clearly and expressly" invoke a state procedural default as a ground for its rejection of the prisoner's claim. The Court began its analysis from the premise that the adequate and independent state ground doctrine was the "historical and theoretical basis" for *Wainwright* v. *Sykes*. *Harris* 489 U.S. at 260. It then observed that *Michigan* v. *Long*, 462 U.S. 1032 (1983), required a "plain statement" in the state court opinion that its decision rested upon an adequate and independent state ground in order to divest this Court of jurisdiction on *direct review* under 28 U.S.C. § 1257. 462 U.S. at 1042. This Court perceived a "common problem" facing this Court on direct review and federal habeas courts under 28 U.S.C. § 2254: A possible lack of certainty about the

basis for the state court's adverse resolution of the criminal defendant's claim. "Faced with a common problem, we adopt a common solution: a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case ""clearly and expressly"" states that its judgment rests on a procedural bar." 489 U.S. at 263.

This Court expressed its belief that the "plain statement" rule would not compromise the state interests of finality, federalism, and comity, but would instead confer several important benefits. Explicit reliance by a state court upon a procedural default would relieve the federal habeas court of the requirement of conducting "an extensive analysis of state law to determine whether a procedural bar was potentially applicable to the particular case." *Id.* at 265. A state court, familiar with state law and the record before it, can determine the existence of a procedural default more reliably and efficiently. A "plain statement" of the existence of the default would allow the "federal court rapidly to identify whether federal issues are properly presented before it." *Id.*

Petitioner readily agrees with the precise holding of *Harris* that a federal claim resolved adversely to a criminal defendant in a state court opinion is reviewable on federal habeas corpus unless the opinion clearly and expressly relies upon a state procedural default. It must be stressed, however, that the last state judicial resolution of the prisoner's claim in *Harris* occurred in a 7-page written *opinion*. For that reason *Harris* provides insufficient guidance to determine the legal significance of an order which denies relief but provides no reason or case citation.

For reasons which follow, petitioner submits that unexplained affirmances or denials of discretionary review must be construed in the context of local law. This principle finds compelling support in the decisions which have addressed the availability of direct review under 28 U.S.C. § 1257 from a "silent" denial by a state high court.

D. **The Significance of "Silent" Orders**

Harris held that the "plain statement" rule, formulated in the context of direct review by this Court under 28 U.S.C. § 1257, was equally applicable to habeas corpus review under 28 U.S.C. § 2254. Therefore, it seems entirely reasonable, indeed inescapable, that this Court's cases construing section 1257 should be equally relevant in informing a district court's interpretation of a "silent" denial in connection with its discretion under section 2254. See *Prihoda* v. *McCaughtry*, 910 F.2d at 1383. A majority of Federal Circuits have followed this approach. *Id*; *Felton* v. *Barnett*, 912 F.2d 92, 94-95 (4th Cir. 1990); *Coleman* v. *Thompson*, 895 F.2d 139, (4th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3325 (1990); *Harmon* v. *Barton*, 894 F.2d 1268, 1272-1274 (11th Cir. 1990); *Russell* v. *Lynaugh*, 892 F.2d 1205 (5th Cir. 1989); *Arce* v. *Smith*, 889 F.2d 1271 (2d Cir. 1989); *Evans* v. *Thompson*, 881 F.2d 17, 123 n.2 (4th Cir. 1989); *Ellis* v. *Lynaugh*, 873 F.2d 830 (5th Cir. 1989); *contra*: *Nunnemaker* v. *Ylst*, 904 F.2d 473 (9th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3344 (1990); *Johnson* v. *Burke*, 903 F.2d 1056 (6th Cir. 1990); *Hill* v. *McMakin*, 893 F.2d 810 (6th Cir. 1989).

Section 1257 of Title 28, United States Code, provides in pertinent part: "Final judgments or decrees rendered by

the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court. . . ." When a state intermediate appellate court has written an opinion supplying reasons for its disposition and judgment, and the state high court has denied discretionary review, on petition for writ of certiorari this Court has "look[ed] straight through a denial of discretionary review" (*Prihoda* v. *McCaughtry*, 910 F.2d at 1383) and has examined the opinion of the highest state court which has provided an explanation. *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 678 n.1 (1968); *Hammerstein* v. *Superior Court*, 341 U.S. 491, 492 (1951); *American Ry. Expr. Co.* v. *Levee*, 263 U.S. 19, 20-21 (1923); *Sullivan* v. *Texas*, 207 U.S. 416 (1908).

Even if the higher court gives as its reason for declining to review the lower court judgment its approval of the opinion below, such a statement does "not take from the refusal its ostensible character of declining jurisdiction." *American Ry. Exp. Co.* v. *Levee, supra*, at 21. If the higher court cannot review the lower court's judgment because the moving party failed to comply with state procedural requirements (filing an untimely petition for review, for example), neither the higher court's order of dismissal nor the lower court's judgment is reviewable by this Court. *Newman* v. *Gates*, 204 U.S. 89 (1907).

The application of these familiar rules to a petition for writ of habeas corpus under section 2254 would not be burdensome for a federal district court sitting in California. Assume that the prisoner appealed to the California Court of Appeal, a remedy available to all persons convicted of felonies in California. Cal.Pen. Code § 1237. If the judgment is affirmed and the California Supreme Court denies discretionary review (Cal. Rules of

Court, rule 28, 29), the prisoner may petition for writ of federal habeas corpus to allege his federal claim. *Roman* v. *Estelle*, ___ F.2d ___ (9th Cir. 1990), 1990 U.S.App. Lexis 18802. Because the state high court's denial of review is not an affirmance on the merits (*People* v. *Triggs*, 8 Cal.3d 884, 890-891, 106 Cal.Rptr. 408 [1973]), the federal district court need only examine the judgment of the court of appeal to determine the reasons for the rejection of the federal claim. *Hammerstein* v. *Superior Court*, 341 U.S. at 492. If the state court of appeal declined to consider the merits of a claim for a procedural reason -- failure to object at trial, for example -- the federal district court would have to consider the efficacy of that state procedural bar. The denial of review, although "silent" in the sense that it gave no reasons and cited no authorities, did not forgive the procedural default expressly invoked by the court of appeal.

Harris does not supersede this vital principle of state appellate procedure. The California Supreme Court's 4,488 case dispositions in fiscal year 1988-1989 included 1,464 petitions for review in criminal cases and 1,005 original habeas corpus petitions. 2 Judicial Council of California, 1990 Annual Report at 24, Table 1. If the denial of review constituted a rejection of the merits of each petition, the supreme court could no longer superintend the jurisprudence of this State. An apt analogy would be an enactment by Congress of a statute which declared that a denial of certiorari by this Court must be construed as a rejection of the merits of the petition and an endorsement of the lower court opinion. For any state court system which presently places no significance upon a denial of discretionary review, a "plain

statement" requirement would place an impossible burden upon the state high court. Even the Ninth Circuit presently respects the state rule that a denial of direct review carries no independent legal significance. *Compare Nunnemaker* v. *Ylst*, 904 F.2d at 476 nn. 4-5, *with McQuown* v. *McCartney*, 795 F.2d 807, 809-810 (9th Cir. 1986).

If the state prisoner has failed to perfect his appeal in the state's high court after a judgment in the intermediate appellate court, local law must also govern the significance of the high court's denial of review. *Cf. Newman* v. *Gates, supra*. Thus, if the applicable rules of appellate procedure establish that the denial of review was jurisdictional, the high court's failure to issue a "plain statement" to that effect does not waive the procedural bar on which the court is exclusively relying. *See Coleman* v. *Thompson*, 895 F.2d at 143.

The Ninth Circuit held that the foregoing principles were inapplicable to this case because the California Supreme Court had exercised its *original*, not its *appellate*, jurisdiction when it denied respondent's petition for habeas corpus on April 7, 1988. 904 F.2d at 476. This Court drew no such distinction in *Harris*, which reviewed an opinion issued by the Illinois Appellate Court in the exercise of its *appellate* jurisdiction. *Cf. Ex parte Hawk*, 321 U.S. 114, 116 (1944). If this Court had relied upon the distinction suggested by the Ninth Circuit, the failure of the Illinois Court to provide a "plain statement" would have been legally inconsequential. A more cogent reading of *Harris*, one which conforms with this Court's section 1257 cases, is that the "plain statement rule" applies to

opinions which provide explanations, not to silent orders which deny discretionary review.

In support of its holding, the Ninth Circuit invoked this Court's dictum in *Harris* that "a state court that wishes to rely on a procedural rule in a one-line *pro forma* order easily can write that 'relief is denied for reasons of procedural default.'" *Nunnemaker*, 904 F.2d at 476, citing *Harris*, 489 U.S. at 265 n. 12. Whatever the merits of such a rule as applied to a trial court in exercise of its habeas jurisdiction,[5/] it is particularly inappropriate to guide an appellate court. As will be explained, *infra*, California Supreme Court habeas corpus jurisdiction has always been wholly discretionary. Each Justice may have his or her own reasons for denial: a lack of merit, a failure to exhaust, a failure to object at trial, a failure to object on appeal, a failure to plead with sufficient particularity. In addition, many, if not most, habeas petitions contain more than one claim, each of which may be denied for different reasons by each Justice. The inescapable result -- one surely not intended by this Court -- would be to require the California Supreme Court, if it does not want to excuse a procedural default, to decide each claim in each habeas petition on a ground upon which a majority of the Justices concur. The supreme

5. California law requires a superior court, the court of general jurisdiction in California, to give "a brief recital of the reasons for the denial" in its order. Cal. Rules of Court, rule 260(e).

court cannot increase its workload by 800 cases[6/] to vindicate the Ninth Circuit's untenable concept of procedural default.

Reflection upon this problem discloses an additional complication. If three Justices deny habeas relief on procedural grounds and one Justice votes to deny solely for failure to state a prima facie case for relief, the Ninth Circuit's opinion provides absolutely no guidance to decide whether the denial was for substantive or procedural reasons.

Simply stated, the rule which petitioner proposes would require federal habeas courts to look to local law to determine the significance of a silent denial of relief. Thus, this Court's cases construing section 1257 should inform the exercise of habeas jurisdiction under section 2254. Courts which reject this approach have asserted that *Harris* counsels against "returning us to second-guessing the state court's determination of state law." *Johnson* v. *Burke*, 903 F.2d at 1060. This rationale is misleading, for it creates the illusion that a federal habeas corpus does not need to consider state law or the history of the prisoner's litigation in state courts in order to resolve his federal claims. In fact, a federal court passing

6. In fiscal year 1988-89, 837 original petitions for writ of habeas corpus were filed in the California Supreme Court. 2 Judicial Council of California, 1990 Annual Report, at 24. Petitioner's review of the California Supreme Court's published minute orders reveals that the state high court issued 550 "silent" denials in calendar year 1989 and 499 such denials in the first nine months of 1990.

upon a petition for writ of habeas corpus cannot avoid delving deeply into questions of state law.

Before resolving the merits of a prisoner's claim, a federal habeas court must decide at least four preliminary issues: (1) the cognizability of the claim; (2) the adequacy of the state courts' determination of questions of fact; (3) exhaustion of state court remedies; and (4) the possible existence of a procedural default barring federal review. *Wainwright* v. *Sykes*, 433 U.S. at 78-79. Only the first issue may be resolved without reference to state law. The federal habeas court must review extensive portions of the record to determine whether it fairly supports any factual findings critical to the prisoner's claim. *Marshall* v. *Lonberger*, 459 U.S. 422, 432 (1983). The district court must also determine whether the prisoner exhausted state remedies by fairly presenting his claim to the state courts. *Castille* v. *Peoples*, 489 U.S. 346 (1989). Consequently, the federal habeas court must discover whether a meaningful state court remedy is still available -- a question of state law. *Id.*; *Harris* v. *Reed*, 489 U.S. at 269 (conc. opn.).

If the custodian asserts a procedural default, the "plain statement" rule does not relieve the federal court of evaluating its "adequacy," in terms of the consistency and predictability of its application by state courts (*Johnson* v. *Mississippi*, 486 U.S. at 587-589), and its "independence," in terms of its connection to resolutions of federal law. *E.g., Delaware* v. *Prouse*, 440 U.S. 648, 651-653 (1979). These inquiries often require extensive review of state law. *E.g. Ulster County Court* v. *Allen*, 442 U.S. at 150-152. Finally, if the district court finds a procedural default, the prisoner is entitled to show cause and prejudice. Efforts to show cause, often based upon allegations of ineffective

assistance of counsel, usually require careful examinations of the state court record, may necessitate time-consuming evidentiary hearings, and, occasionally, may require assessment of the development of state substantive law at the time of trial. *E.g., Engle* v. *Isaac*, 456 U.S. at 131-134 & n. 40. An allegation of prejudice, of course, will inevitably require the same extensive factual review.

A federal habeas court cannot avoid the obligation of evaluating a prisoner's claim against the background of the state court record and pertinent local law. *Harris* teaches that inquiries into state law should be minimized when possible but does not pretend they can be eliminated entirely. *See, e.g., Rummel* v. *Estelle*, 445 U.S. 263, 267 n.7 (1980). Federal courts long have been obliged to familiarize themselves with state substantive law in the civil context. *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). Comprehension of state criminal procedural rules should not prove any more difficult.

E. The Silent Denial of the State Supreme Court Did Not Forgive The Procedural Default Invoked by the State Court of Appeals.

Finally, the relevant state procedural rules are identified and applied to this case. The Ninth Circuit erred in concluding that the silent denial of habeas relief by the state supreme court impliedly forgave the procedural default expressly invoked by the state court of appeal ten years earlier.

1. **State Habeas Corpus Procedure.**

The writ of habeas corpus is guaranteed by the California Constitution (Art. I, § 11) and statute (Cal. Pen. Code, §§ 1473 *et seq.*). Although the supreme court and courts of appeal have original jurisdiction in habeas corpus proceedings (Cal.Const., Art. VI, § 10), a prisoner seeking such collateral review is expected to file his petition first in superior court, the court of general jurisdiction which has the power to hear evidence and resolve factual disputes. *See e.g., In re Hillery*, 202 Cal.App.2d 293, 20 Cal.Rptr. 759 (1962).

The petition is an application for a writ of habeas corpus; it must allege the reason why the petitioner's imprisonment is illegal. Cal. Pen. Code § 1474; *People* v. *Pacini*, 120 Cal.App.3d 877, 883-884, 174 Cal.Rptr. 820 (1981). If the petition does not state facts which, if true, would entitle the petitioner to relief, the court must deny the petition. *Griggs* v. *Superior Court*, 16 Cal.3d 341, 347, 128 Cal.Rptr. 223 (1976); *In re Swain*, 34 Cal.2d 300, 304, 209 P.2d 793 (1949). If the petition does state a prima facie case for relief, the court then issues an order to show cause. *See In re Lewallen*, 23 Cal.3d 274, 278 n.2, 152 Cal.Rptr. 528 (1979); *In re Hochberg*, 2 Cal.3d 870, 873 n. 2, 87 Cal.Rptr. 681 (1970). The order to show cause directs the custodian to serve and file a written return, which must "plainly and unequivocally" "state the authority and cause of such imprisonment or restraint." Cal. Pen. Code § 1480. The return, which must be "responsive to the grounds actually presented in the petition" (*People* v. *Green*, 27 Cal.3d 1, 43 n. 28, 164 Cal.Rptr. 1 [1980]), "functions analogously to a '"complaint

in a civil proceeding"' in asserting grounds of legality and 'as to any factual allegations it makes.'" *People* v. *Pacini*, 120 Cal.App.3d at 884, 174 Cal.Rptr. at 826.

The petitioner then responds by filing a traverse in which he "may deny or controvert any of the material facts or matters set forth in the return. . . ." Cal. Pen. Code § 1484; *In re Saunders*, 2 Cal.3d 1033, 1047, 88 Cal.Rptr. 633 (1970). "The traverse, and the petition whereby stipulation or acquiescence it is treated as a traverse . . . are analogous to the answer in a civil proceeding. . . ." *Ibid.* "The issues are joined in this manner, and 'new matter set up in the petition [and traverse] which tends to invalidate the apparent effect of the process set forth in the return is deemed denied and must be proved by the party alleging it, namely the petitioner.'" *Id.* at 1047-1048, 88 Cal.Rptr. 633. If the petitioner "except[s] to the sufficiency" (Cal. Pen. Code, § 1484) of the return in his traverse, he has in effect raised questions of law by a procedure analogous to demurrer. By the same token, if the return acknowledges the allegations in the petition and traverse, relief may be granted without a hearing if those allegations justify such action. *In re Saunders*, 2 Cal.3d at 1048, 88 Cal.Rptr. 633; *In re Masching*, 41 Cal.2d 530, 533, 261 P.2d 251 (1953). If the issue is not the legal significance of undisputed allegations, but the existence of disputed facts, the superior court may compel the attendance of witnesses and may "do and perform all other facts and things necessary to a full and fair hearing and determination of the case." Cal. Pen. Code § 1484.

If the superior court denies relief, its order "shall contain a brief recital of the reasons for the denial."[7] Cal. Rules of Court, rule 260. The petitioner has no right to appeal the superior court's denial, but must file a new petition in either the court of appeal or the supreme court. *Gardner* v. *California*, 393 U.S. 367, 368 (1969); *In re Crow*, 4 Cal.3d 613, 621 n. 8, 94 Cal.Rptr. 254 (1971). With one exception, the rules of pleading and proof delineated above are generally applicable to appellate courts. The supreme court and courts of appeal have no power to find facts. If a petition and return generate a factual conflict, the appellate court will appoint a referee to hold a hearing and make findings and conclusions. *In re Egan*, 24 Cal.2d 323, 327, 149 P.2d 693 (1944). Alternatively, when the court of appeal issues an order to show cause, it may make it returnable before the superior court, which will hold the hearing. *In re Hochberg, supra*, 2 Cal.3d at 873-874 n. 2, 87 Cal.Rptr. 681.

Should the court of appeal deny the writ of habeas corpus, the prisoner has two possible remedies. If the court of appeal denies relief without opinion, the prisoner simply petitions for habeas corpus in the supreme court. Cal. Pen. Code § 1475; *In re Crow*, 4 Cal.3d at 621 n. 8, 94 Cal.Rptr. 254. If, however, the court writes an opinion which denies relief, an action necessitated by the issuance of an order to show cause and the filing of a return (*In re Mazoros*, 76 Cal.App.3d 50, 52-53, 142 Cal.Rptr. 609 (1977)), a petition for review in the state supreme court

7. No similar rule governs California appellate courts.

is the preferred, though not mandatory, remedy.[8] Cal. Pen. Code § 1506; Cal. Rules of Court, rule 28; *In re Michael E.*, 15 Cal.3d 183, 193 n. 15, 123 Cal.Rptr. 103 (1975).

Habeas corpus generally will not lie to consider issues which were raised, or could have been raised, on direct review (*In re Terry*, 4 Cal.3d 911, 927, 95 Cal.Rptr. 31 (1971); *In re Waltreus*, 62 Cal.2d 218, 225, 42 Cal.Rptr. 9 (1965)), unless newly discovered facts or a change in the law merit discretionary reconsideration of the claim. *In re Terry, supra*; *In re Bevill*, 68 Cal.2d 854, 863 n. 9, 69 Cal.Rptr. 599 (1968). Similarly, a contention which has been raised and rejected in a prior application for habeas corpus will not be reconsidered. *In re Lynch*, 8 Cal.3d

8. The choice of remedies is the petitioner's although the California Supreme Court may summarily deny either the petition for habeas corpus or petition for review. However, the Ninth Circuit presumes that a silent habeas denial is on the merits, while a silent denial of a petition for review is not. *McQuown* v. *McCartney*, 795 F.2d at 807, 809-810 (9th Cir. 1986). This distinction has been justified on the ground that the petition for review invokes appellate jurisdiction, but the habeas corpus petition invokes original jurisdiction. This rationale has no basis in California Supreme Court practice and is contrary to *Ex parte Hawk*, 321 U.S. at 115-116. In short, the integrity of state procedural rules, enforced by procedural default, depends on the petitioner's often fortitous choice of a title for his petition. The Ninth Circuit's opinion in the case suggests that *Harris* v. *Reed* obliterates the arid distinction of *McQuown* by extending the presumption of silent waiver of procedural defaults to petitions for review on direct appeal. 904 F.2d at 476 n. 4.

410, 439 n. 26, 105 Cal.Rptr. 217 (1972); *In re Miller*, 17 Cal.2d 734, 735, 112 P.2d 10 (1941).

Finally, it is important to comprehend the significance of a summary denial of a writ of habeas corpus such as that issued by the California Supreme Court upon respondent's second application for habeas corpus relief. Supreme Court habeas corpus jurisdiction has always been wholly discretionary. Supreme Court of California, Practices and Procedure (1990 Rev.) at 12, 13; *see People* v. *Connor*, 270 Cal.App.2d 630, 638 n.2,; 76 Cal.Rptr. 72 (1969). Hence, the court may summarily deny a petition without a statement of reasons or citation to case authority. The California Constitution requires that "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." Cal.Const., Art. VI, § 14. Because a summary denial is without opinion, it cannot be a determination of a "cause" within the meaning of the state constitution. *See People* v. *Medina*, 6 Cal.3d 484, 490, 99 Cal.Rptr. 630 (1972); *Myers* v. *Ylst*, 897 F.2d 417, 426-428 (9th Cir. 1990) (diss.opn.). For this reason a summary denial of a habeas petition does not establish the law of the case. *People* v. *Pacini*, 120 Cal.App.3d at 884, 174 Cal.Rptr. at 826. It is not a judgment which conclusively and definitively establishes the rights and obligations of the parties. To give such preclusive effect to a summary denial would violate the California Constitution. The Ninth Circuit's opinion has, in effect, accused the California Supreme Court of habitually violating its own charter.

2. **Disposition of This Case.**

In light of well-established principles of state habeas corpus, it is beyond dispute that the California Supreme Court never has forgiven the procedural default invoked by the California Court of Appeal. To reach this conclusion a federal habeas court need only "look through" the silent denial habeas corpus in 1988 and the silent denial of hearing in 1978 to the opinion of the court of appeal, which declined to consider the merits of respondent's claim by reason of his failure to object at trial. Cal. Evid. Code § 353.

Even if the first denial of habeas relief by the state supreme court were relevant to this issue, it did not forgive the procedural default. Most of the contentions made by respondent in his first petition for writ of habeas corpus in the state supreme court had been raised on direct review. (J.A. 5-21; 53-74.) Habeas corpus will not lie to relitigate claims that were raised, or could have been raised, on appeal. *In re Waltreus, supra,* which the supreme court cited in its first minute order (J.A. 82), stands for this proposition. In his habeas petition, respondent also challenged the admissibility of the testimony of "emotionally disturbed children," (*see* J.A. 77-79), a claim which was not raised on appeal. The supreme court then addressed that contention with its citation of *In re Swain, supra*, which holds that "vague, conclusionary allegations . . . are insufficient to warrant issuance of the writ," but its denial "is not a ruling on the merits. . . ." 34 Cal.2d at 303-304, 209 P.2d at 793. Thus, relief could not be granted unless petitioner explained his contention with sufficient particularity and,

in addition, disclosed the reasons for any delay in the presentation of those facts. *Id.*

Although federal courts sitting in California appreciate the significance of *Waltreus* and *Swain* to the California Supreme Court (J.A. 83), they are not required to decipher summary denials of habeas corpus in order to determine their legal basis. Rather, they need only remember one overarching principle: A summary denial of habeas corpus, even with a case citation, is not a "judgment" which in any way replaces or supplants an opinion of an appellate court affirming a criminal conviction. The last state court rendering a "judgment" in this case was the court of appeal, which refused to consider respondent's *Miranda* claim by reason of his procedural default at trial. A subsequent summary denial of habeas relief by a California state court is not a judgment which forgives the procedural bar.

The last denial of habeas relief by the state supreme court, in April of 1988, cited no cases, presumably because the petition merely renewed a claim which previously had been rejected by the supreme court in its denial of habeas relief. *See In re Bevill*, 68 Cal.2d at 863 n.9, 69 Cal.Rptr. 599. Petitioner again stresses that it was unnecessary for a federal court to attempt to discern the reason for the denial. Rather, an examination of the opinion of the state court of appeal conclusively reveals that the state appellate judiciary declined to reach the merits of petitioner's claim because of his procedural default. Subsequent silent orders by the supreme court denying direct review and collateral relief do not add to or detract from the significance of the written opinion, which contained a "plain statement" required by *Harris*.

The Ninth Circuit's misapprehension of this principle of state law arose not from a careful examination of California procedural rules but from an untenable transformation of the circuit's own rules respecting exhaustion into principles governing procedural default. In *Harris* v. *Superior Court*, 500 F.2d 1124 (9th Cir. 1974) (*en banc*), the Ninth Circuit held that the California Supreme Court's summary denial of a state habeas petition is a decision on the merits for purpose of *exhaustion*. Such a rule is a necessary fiction created to avoid a waste of the prisoner's time in attempting to comply with the exhaustion requirement. *See Thompson* v. *Procunier*, 539 F.2d 26, 28 (9th Cir. 1976). If the state court's silence were understood as a denial on procedural grounds, the state prisoner might be placed in legal limbo, unable to obtain a ruling on the merits from the highest state court, unable to cross the exhaustion threshold of the federal district court. That outcome would advance no legitimate interest of the state or the petitioner. Understandably, this Circuit concluded that a defendant whose state habeas petition was denied without explanation had exhausted his state remedies.

This result could have been better explained on the ground that the purpose of the exhaustion doctrine, "to minimize friction between our federal and state systems of justice by allowing the State an initial *opportunity* to pass upon the correct allege violations of prisoners' federal rights," (*Duckworth* v. *Serrano*, 454 U.S. 1, 3 [1981] [emphasis added]), was adequately served by a state habeas petition which fairly presented the federal claim, thus providing the highest state court with an *opportunity* to consider that claim. *See Castille* v. *Peoples*, 489 U.S. at

351. Unfortunately, the Ninth Circuit chose instead to characterize the state court's summary denial as a ruling on the merits. It then applied this presumption, developed in the context of exhaustion, to *procedural defaults*, holding that a summary denial forgave any and every failure to follow this state's trial and appellate procedural rules. *E.g., Lewis* v. *Borg*, 879 F.2d 697 (9th Cir. 1989); *LaRue* v. *McCarthy*, 833 F.2d 140 (9th Cir. 1987); *Maxwell* v. *Sumner*, 673 F.2d 1031 (9th Cir.); *cert. denied*, 459 U.S. 976 (1982); *Thompson* v. *Procunier, supra*; *contra, McQuown* v. *McCartney*, 795 F.2d 807 (denial of hearing not a ruling on the merits).

To put it bluntly, the Ninth Circuit's attempt to reconcile its misapprehension of state law with its perceived necessity of providing a federal forum for state prisoners has resulted in chaos. As a result, a carefully reasoned opinion of the California Supreme Court which invokes a procedural default on direct review would be supplanted by a casual minute order of a superior court denying relief without comment. If the court of appeal and supreme court also summarily deny relief, a procedural bar miraculously is transformed into a decision on the merits. Indeed, even if the superior court denies relief in a written opinion which invoked a procedural bar, a one-line denial by the state court of appeal and supreme court will also produce this wholly unintended transformation.

Much, though not all, of the confusion engendered by the Ninth Circuit's decisions can be clarified by the rule which petitioner has proposed: A silent state court order should be construed by a federal habeas court under section 2254 as it is by this Court under section 1257. So

construed, a silent denial of habeas relief does not forgive, or any way alter, a procedural default invoked by an appellate court in a written opinion. *Harris* does not require a "plain statement," once plainly stated, to be endlessly reiterated.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

DATED: December 19, 1990

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No. 90-68

In The

Supreme Court of the United States

October Term, 1990

EDDIE S. YLST, WARDEN,

Petitioner,

v.

OWEN DUANE NUNNEMAKER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether, despite the "plain statement" rule of *Harris v. Reed*, 489 U.S. 255 (1989), a federal court must undertake a comprehensive review of state law and prior state court proceedings in an attempt to divine the California Supreme Court's reasons for a pro forma denial without comment of a petition for writ of habeas corpus.

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OPINION BELOW

In addition to the decisions listed by petitioner, the judgment of the California Supreme Court summarily denying Mr. Nunnemaker's petition for writ of habeas corpus should be included. This order appears in the Joint Appendix at page 114.

STATEMENT OF THE CASE

After respondent, Owen Duane Nunnemaker, was arrested and in custody, the district attorney sent a psychiatrist to interview him. After asking Mr. Nunnemaker his age and occupation, the psychiatrist told Mr. Nunnemaker that the district attorney had asked him to see Mr. Nunnemaker. At no time was Mr. Nunnemaker advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). The psychiatrist proceeded to interview Mr. Nunnemaker regarding his marriage, the circumstances which led to the separation, his difficulties during the separation, and the circumstances that Mr. Nunnemaker recalled about the shooting. After collecting this information, the psychiatrist filed a five-page report with the district attorney.

An information charging Mr. Nunnemaker with murder and assault with a deadly weapon was filed in the Sonoma County Superior Court on August 21, 1975. At the jury trial, the prosecution in its rebuttal presented evidence of Mr. Nunnemaker's statements made during the interview with the prosecution psychiatrist. The jury found Mr. Nunnemaker guilty of murder in the first degree, but acquitted him on a separate assault charge.

On direct appeal to the California Court of Appeal, Mr. Nunnemaker raised federal constitutional challenges to the testimony of the prosecution psychiatrist. In affirming the conviction, the state appellate court avoided these challenges, holding that the failure to interpose a specific objection during trial precluded consideration on review. J.A. 15-18. The California Supreme Court denied Mr. Nunnemaker's petition for hearing on September 27, 1978. J.A. 26.

In 1985, Mr. Nunnemaker filed pro per petitions for habeas relief in the Sonoma County Superior Court and the state Court of Appeal. After these were denied, Mr. Nunnemaker filed an original petition for writ of habeas corpus in the California Supreme Court (Case No. Crim. 25449). J.A. 27-81. This petition was denied with citations to *In re Swain*, 34 Cal. 2d 300, 304 (1949), and *In re Waltreus*, 62 Cal. 2d 218, 255 (1965). J.A. 82.

Mr. Nunnemaker then filed a pro per petition for habeas relief in the United States District Court for the Northern District of California. This petition was dismissed without prejudice because it was not clear whether all state remedies had been exhausted. J.A. 83-87. A "Resubmission of Petition for Writ of Habeas Corpus" was filed by Mr. Nunnemaker in the federal district court on November 30, 1987. The petition was again denied without prejudice with a suggestion by the district court that Mr. Nunnemaker return to state court or that he abandon any unexhausted claims and refile the petition in the Federal Court. J.A. 88-91.

Mr. Nunnemaker then filed a second petition for habeas relief in the California Supreme Court. J.A. 91-113.

On April 7, 1988, this petition was denied without citation or comment. J.A. 114.

After the California Supreme Court denied the petition, Mr. Nunnemaker filed another petition for habeas relief in the federal district court. An Order to Show Cause was issued on July 8, 1988. On December 9, 1988, this petition was denied. The federal district court found that the state procedural default invoked by the court of appeal on direct appeal barred review of the challenges to the prosecution's psychiatric testimony. J.A. 116-118.

On appeal, the Ninth Circuit, following the rule announced in *Harris v. Reed*, 489 U.S. 255 (1989), reversed the ruling of the district court. The Ninth Circuit held that when the California Supreme Court does not plainly state in its denial of an original habeas petition that its ruling rests on a state procedural bar, federal habeas review is not precluded. J.A. 128-149. On May 25, 1990, the Ninth Circuit denied rehearing and amended its opinion. J.A. 150.

A petition for certiorari was filed on July 9, 1990, and certiorari was granted November 5, 1990.

SUMMARY OF ARGUMENT

In *Harris v. Reed*, 489 U.S. 255 (1989), the "plain statement" rule of *Michigan v. Long*, 463 U.S. 1032 (1988), was applied to federal habeas review of state court convictions under 28 U.S.C. § 2254. Under *Harris*, if the last state court rendering a judgment in the case clearly and expressly relies on a procedural default, federal habeas

review will be foreclosed, absent cause and prejudice or other exception. If, on the other hand, there is no clear and express reliance on procedural default, the federal habeas review must proceed. Where there is any ambiguity in this regard, that ambiguity must be resolved in favor of preserving the federal issue for habeas review. Applying the rationale and plain language of *Harris v. Reed*, 489 U.S. 255 (1989), the Ninth Circuit held in this case that because the California Supreme Court's minute order denial of Mr. Nunnemaker's original petition for habeas corpus relief contains no clear statement that its ruling rested on a state procedural bar, federal habeas review is not precluded.

All of the rationale in *Harris v. Reed* for applying the "plain statement" rule to habeas corpus cases apply here where the state court gives no reasons for its denial of an original petition requesting habeas relief, and the application of the rule poses no real additional burden on the state court. The California Supreme Court has in fact issued "plain statements" of its reliance on procedural default for over two decades. Both the California Supreme Court and the Ninth Circuit have recognized, without objection by the state attorney general, that a minute order denial of state habeas relief will be treated as a determination on the merits. This recognition is premised upon a correct understanding of California's discretionary procedural default rules, which permit a petitioner to cure a procedural defect in a successor petition and allow the state court to excuse defaults under some circumstances. Without justification, petitioner now proposes a whole new and different procedure for

dealing with minute order denials in the context of procedural default.

Applying the "plain statement" rule where no reasons are given by the state court for denial of an original petition for habeas corpus "burdens [the interests of finality, federalism, and comity] only minimally, if at all. The benefits, in contrast, are substantial." *Harris v. Reed*, 489 U.S. 255, 264 (1969). "[A] state court that wishes to rely on a procedural bar rule in a one-line *pro forma* order easily can write that 'relief is denied for reasons of procedural default.' " *Id.* at 264 n.12.

In *Harris v. Reed*, this Court has given the states an eminently clear and direct way to assert procedural default if it wishes to do so. The federal courts are not interfering with or restricting in any way the state court's reliance on procedural default. *Harris v. Reed* simply holds that if the state court relies on its own rules of procedural default, it should say so. The rationale of *Harris v. Reed*, applying the "plain statement" rule to habeas cases, should apply here where no reasons for denial of a state habeas petition was given. Federal review of Mr. Nunnemaker's federal constitutional issue should not be foreclosed.

ARGUMENT

I.

APPLYING THE "PLAIN STATEMENT" RULE HAS IMPOSED NO UNMANAGEABLE BURDEN ON THE CALIFORNIA SUPREME COURT

For twenty-one years The California Supreme Court has issued "plain statements" of its reliance on

procedural default. Petitioner's position represents a radical departure from the current law and practice of the California Supreme Court.

Since the Ninth Circuit's opinion in *Harris v. Superior Court*, 500 F.2d 1124 (9th Cir. 1974), *cert. denied*, 420 U.S. 973 (1975), the California Supreme Court has understood that its 21 year old practice of issuing a denial, without comment or citations, of an original habeas corpus petition would be treated by the federal courts as a determination on the merits. It has neither disputed nor chafed at this practice and has necessarily understood that if it wished to afford its citizens full review of federal constitutional claims in federal court, it could do so by issuing an unadorned denial.

In *Harris v. Superior Court*, 500 F.2d 1124 (9th Cir. 1974), *cert. denied*, 420 U.S. 973 (1975), the Ninth Circuit conducted a careful review of the California Supreme Court's practice of denying habeas corpus petitions without opinion. They noted that in California, the federal courts had difficulty in the past in determining whether the California Supreme Court's denial of a petition for habeas corpus was on procedural grounds or was on the merits. "The use by [the California Supreme Court] of the postcard denial has been at the root of the problem. As [the Ninth Circuit had] noted before, '[f]rom our standpoint, the failure of the California court to reveal the basis of its denial, whether substantive or procedural, is unfortunate.' " *Harris v. Superior Court*, 500 F.2d 1124, 1127 (9th Cir. 1974) (citing *Castro v. Klinger*, 373 F.2d 847 (9th Cir. 1967).

The California Supreme Court changed its practice, slightly revising the form of its postcard denials. The Ninth Circuit found that since 1969, the state supreme court has invariably noted on its denials of habeas corpus petitions the procedural grounds on which it refuses relief. *Id.* at 1127-28. The court concluded that there is "now no reason to suppose that a postcard denial without opinion is indicative of anything but a decision on the merits of the petition, except where a citation in the order tells us so." *Id.* at 1128. This rule has been applied consistently in the Ninth Circuit with the approval of the state. *See, e.g., McQuown v. McCartney*, 795 F.2d 807 (9th Cir. 1986); *LaRue v. McCarthy*, 833 F.2d 140 (9th Cir. 1987); *Kim v. Villalobos*, 799 F.2d 1317 (9th Cir. 1986).

In *McQuown v. McCarthy, supra*, the Ninth Circuit ruled that the failure to file an original petition in the California Supreme Court, even where a petition for review of a lower court denial of a habeas petition was filed and denied by the state high court, precluded federal habeas review because of a failure to exhaust state remedies. The Ninth Circuit and the California Attorney General agreed in that case. In its "Appellee's Response to Petition for Rehearing En Banc" (9th Cir. Case No. 84-6289), the California Attorney General argued that a summary denial of an original habeas corpus petition was a ruling on the merits:

> Next, appellee disagrees with appellant's argument this court's decision severely disrupts state appellate practice. The decision reached by this Court in the instant case leaves in tact (sic) *the general presumption a summary denial of a petition for habeas corpus by the California Supreme Court,*

without more, constitutes a ruling on the merits by that court. (Citations omitted; emphasis added)

Petitioner asks this Court to compare the decision in *Nunnemaker v. Ylst* with the decision in *McQuown v. McCartney*. Brief for Petitioner at 21. In fact, the cases are consistent in their analysis and application of state law.

Petitioner's position is, as his own statistics in his Petition for Rehearing and Suggestion for Rehearing En Banc filed in the Ninth Circuit show, inconsistent with the actual practice of the California Supreme Court. As petitioner noted, during the calendar year 1989, of the 898 original petitions for writs of habeas corpus which were denied, 550 were denied without explanation. The rest were denied with citations to one or more cases signalling procedural defect. The inescapable inference is, as the Attorney General conceded in *McQuown*, that the unadorned denials are not denials for reasons of procedural default. In other words, approximately 39% of the time the Court determined that it was appropriate to deny relief for reasons of procedural default; the remainder of the time a majority of the court deemed it appropriate to deny relief for reasons pertaining to the merits of a claim. Respondent's review of the Court's rulings in 1986 and 1988, the years in which respondent filed his two state habeas corpus petitions, is consistent with petitioner's own findings in that approximately 37% of the petitions denied in 1986 were denied for procedural reasons and 44% were so denied in 1988.

Petitioner now proposes that state law be interpreted differently. Interpreting the law of California one way for purposes of exhaustion and another way for purposes of procedural default does not promote consistency of law.

The application of a rule of law or the interpretation of law should not depend on the result or on who would ultimately benefit.

II.

THE DENIAL OF THE HABEAS CORPUS PETITION IS THE LAST STATE COURT JUDGMENT

Regardless of the fact that petitioner has argued in the past that a denial without comment or citation of an original habeas corpus petition is a decision on the merits, they now contend that such a denial is not a decision on the merits, arguing that the granting or denying of a habeas petition in the state court is purely discretionary. This argument is incorrect as a matter of state law.

A. State Habeas Corpus in California

Petitioner's position that a denial of an original habeas corpus petition should not be treated as a judgment on the merits (i.e., a denial for reasons other than procedural default) within the meaning of *Harris v. Reed* represents a fundamental misunderstanding of the habeas corpus remedy in California and the nature of a denial of an original petition for a writ of habeas corpus in four critical respects. First, the state supreme court, when confronted with a habeas corpus petition, must examine the bona fides of each petition before issuing a ruling, even if that ruling is simply a summary denial. Second, habeas corpus is the only method for bringing

facts outside the record to the Court's attention.[1] Third, for each potentially applicable procedural default in habeas corpus, there are numerous exceptions and, even when no exception applies, the state court may choose not to rely on such a default in denying relief. Fourth, a summary denial of a petition for review, unlike a pro forma order denying habeas corpus relief, may be issued without reviewing the merits of the claim.

These practices have the following critical implications and demonstrate the incorrectness of petitioner's position. First, a minute order denial of an original habeas corpus is a judgment under *Harris v. Reed* because it represents a review by the Court of the bona fides of the individual claims presented in a petition for their substantive and procedural sufficiency. Second, because of the great measure of discretion employed by the California Supreme Court in deciding whether to bar a petitioner's claim for reasons of procedural default and because facts outside the record may show that an earlier procedural default by a lower court was wrongly imposed, there is no basis to assert that a denial of an original habeas corpus, following a finding in an earlier

[1] In contrast to states like Arizona, California does not have an independent statutory "post-conviction" relief procedure. (*See* Amicus Brief of the States of Arizona, et al. at page 7, n.1.) In California, habeas corpus "may be used to challenge a judgment of conviction where the court was without jurisdiction or the proceedings were violative of the defendant's fundamental rights. Thus, habeas corpus, as a supplement to appeal and sometimes despite failure to appeal, has become a common method of post-conviction review of criminal proceedings." 6 Witkin & Epstein, *California Criminal Law*, § 3348, p. 452 (2d ed. 1989).

proceeding of procedural default, necessarily endorses that default.

1. Every Unlawfully Confined Citizen May Petition For Habeas Corpus Relief and the State Court Examines the Bona Fides of Each Individual Claim.

In California, every person unlawfully imprisoned or restrained has the right to prosecute a writ of habeas corpus "to inquire into the cause of such imprisonment or restraint" and every court in California, including the California Supreme Court, may exercise original jurisdiction over such writs. Cal. Pen. Code § 1473, subd. (a); Cal. Const., art. VI, § 10. This right to petition may only be suspended if required by public safety. Cal. Const., art. I., § 11.

The habeas corpus petitioner bears the burden of stating a prima facie case for relief and of pleading his compliance with procedural matters as well. *People v. Bower*, 38 Cal. 3d 865, 872 (1985) (petitioner must explain any delay in making claim and plead facts which if true, justify relief); *In re Lawler*, 23 Cal. 3d 190, 194 (1979) (facts must be sufficient to justify relief); *see also* Cal. Pen. Code § 1475 (petitioner must state whether prior habeas corpus applications have been made and provide results). When the facts, if true, would entitle petitioner to relief, the court must issue an order to show cause. *In re Lawler*, 23 Cal. 3d at 194; see also *In re Hochberg*, 2 Cal. 3d 870, 875 n.4 (1970).[2] Conversely, any petition that does not meet

[2] Once an order to show cause issues, the matter becomes a "cause" within the meaning of the California Constitution (article VI, § 14), and the court must issue a written opinion. *People v. Pacini*, 120 Cal. App. 3d 877, 884 (1981).

these standards must be summarily denied. *People v. Gonzales*, 51 Cal. 3d 1179, 1258 (1990). An examination of the merits of the substantive claim includes the question of whether the error, if it occurred, was prejudicial. *See id.* at 1241-42 (declining to issue an order to show cause on issues of prosecutorial misconduct and ineffective assistance of counsel for failure to disclose/use available impeachment evidence because any error was clearly harmless).

As the foregoing demonstrates, before the California Supreme Court (or any lower court) may deny a habeas corpus petition, it must examine the pleading to determine whether the substantive issues are cognizable in habeas corpus, whether the petition states a prima facie case for relief, and whether petitioner has cleared potential procedural hurdles. Thus, the California Supreme Court must examine the substantive issues and their merits which are presented in original habeas corpus writs before issuing even a minute order pro forma denial. This feature of state habeas corpus law distinguishes minute order denials following original habeas petitions from minute order denials of petitions for review in California and distinguishes California's procedures from those employed in many of the cases from other circuits cited by petitioner.

2. Habeas Corpus as an Exclusive Remedy.

Petitioner also fails to note that "[i]t is . . . well-established . . . that when reference to matters outside the record is necessary to establish that a defendant has been denied a fundamental constitutional right, resort to

habeas corpus is not only appropriate but required." *In re Bower*, 38 Cal. 3d 865, 872 (1985); see also *In re Lewallen*, 23 Cal. 3d 274, 278 (1979); *People v. Westmoreland*, 58 Cal. App. 3d 32, 36 (1976). Thus, for example, a habeas corpus petitioner may have been denied relief on direct appeal because no objection appeared in the trial record. He may then file a habeas corpus petition, referring to facts outside the appellate transcript, which show that an objection was made in chambers, or that he was deemed to have a continuing objection to a certain line of questioning, or to show that the action was taken ex parte without his presence or knowledge.

Under such circumstances, if the California Supreme Court recognized that the claim had not in fact been defaulted but it nonetheless wished to deny the petition, it would reject it on its merits, and signal that rejection by issuing a minute order denial. Under petitioner's position, however, such a denial would be treated as a nullity at best or, at worst, as a reaffirmation of the earlier statement by the lower court of procedural default. By ignoring this use of habeas corpus – to present facts which were not part of the appellate record – petitioner propounds a rule whereby an earlier, factually inaccurate ruling rejecting a constitutional issue for failure to comply with a state rule of procedure, could never be overcome, despite the existence of facts to excuse the default unless the California Supreme Court issued an order to show cause and wrote an opinion. As discussed more fully below, this is but one of the ways in which adopting petitioner's rule will make more, not less work for the state court.

B. Summary Denials of Petitions for Review Distinguished

Arguing by analogy to cases defining a "judgment" for purposes of this Court's certiorari jurisdiction under 28 U.S.C. § 1257, petitioner contends that an order by the state court summarily denying an original petition for a writ of habeas corpus is not a judgment within the meaning of *Harris v. Reed*. In so arguing, petitioner confuses a petition for review of a lower court decision and an original petition for a writ of habeas corpus.

There is some authority for the proposition that *Harris's* reference to "the last state court judgment in the case" should be understood to refer to the state court whose judgment would be subject to review on petition for writ of certiorari. *See, e.g., Goodwin v. Collins*, 910 F.2d 185, 187 (5th Cir. 1990); *Prihoda v. McCaughtry*, 910 F.2d 1379 (7th Cir. 1990). However, as far as respondent is aware, there has never been any suggestion that a writ of certiorari does not run to the California Supreme Court's minute order denial of an original writ of habeas corpus. Only a few months ago, two members of this Court voted to grant certiorari from such an order of the California Supreme Court. *See Robertson v. California*, ___ U.S. ___, 111 S. Ct. 568 (Marshall, J. and Blackmun, J., dissenting from denial of petition for writ of certiorari).[3]

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[3] The California Attorney General's brief in opposition to the petition of certiorari in that case contained no argument that certiorari did not lie with respect to the California Supreme Court's "silent" denial of Robertson's original habeas petition. *See Robertson v. California*, No. 90-5774, Opposition to Petition for Writ of Certiorari.

It is true that when the highest state court, in the exercise of discretion, declines to review the decision of an intermediate appellate court decision, certiorari runs to an intermediate court's decision, not to the highest state court. *Sullivan v. Texas*, 207 U.S. 416 (1908); *Hammerstein v. Superior Court*, 341 U.S. 491, 492 (1952). However, petitioner's analogy to discretionary review on appeal is simply inapt. Original petitions for a writ of habeas corpus in the California Supreme Court cannot be compared to petitions for review in the state supreme court or petitions for certiorari in this Court. When a criminal defendant loses his case on direct appeal in the intermediate appellate court he may petition the California Supreme Court for review. He may also petition for review following a denial of habeas corpus relief by the lower courts. Petitions for review are governed by Rules 28 and 29.[4]

Under Rule 29, "Review by the Supreme Court of a decision of a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important question of law; (2) where the Court of Appeal was without jurisdiction of the cause; or (3) where, because of disqualification or other reason, the decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges." The first category is the one most commonly relied upon by litigants

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[4] Prior to May 5, 1985, such petitions were called petitions for hearing. In May, 1985, changes were made in the process which resulted in a change in terminology. The changes that were made do not alter the discussion set forth above concerning the grounds for granting review or hearing.

and is analogous to this Court's Rule 10.1. None of these categories involves an examination of the individual merits of a litigant's claim and indeed, review can be granted or denied without any inspection of the petition's merits. Put differently, a judge may decline to vote to accept review, although he believes petitioner has been grievously wronged, simply because the issue is not an important question of law or the legal principles are not ones on which the lower courts are divided. In so doing, the judge would be acting within and consistent with the governing law and could, under the law, vote to deny the petition without pausing to consider the merits of the substantive claim presented. *See People v. Triggs*, 8 Cal. 3d 884, 891 (1973) ("The significance of such refusal [to grant review] is not greater than this – that this court does not consider that the interests of justice, or the purposes for which the power [to grant a hearing] was given, require its exercise in the particular case." [citations omitted]). In such a situation it is clear that a denial is not any expression by the Court of its view of the bona fides of an issue but simply an indication that the matter is not worthy of the court's attention and does not fit within the Rule 29 criteria.

There is no comparable rule governing the disposition of original writs of habeas corpus. There is no rule which permits the Court to decline to afford relief or to decline to issue an order to show cause if the issue has merit and petitioner is entitled to relief if the facts alleged are proven. In fact, the rules are precisely the converse. In order to decide whether, under the law, to issue an order to show cause and ultimately grant relief or whether to deny the petition, the Court must examine the bona fides

(substantive and procedural) of the individual claim presented. *People v. Gonzales*, 51 Cal. 3d 1179, 1258 (1990).

As the foregoing demonstrates, before the California Supreme Court (or any lower court) may deny a habeas corpus petition, it must examine the pleading to determine whether the substantive issues are cognizable in habeas corpus, whether the petition states a prima facie case for relief, and whether petitioner has cleared potential procedural hurdles. There is nothing in this statutory framework that vests the California Supreme Court, or any other California court for that matter, with discretion to decline to entertain an original habeas petition.

C. Federal Habeas Corpus

Petitioner's alternative analogy to this Court's original habeas corpus jurisdiction is similarly inapt. Unlike the original habeas jurisdiction of the California Supreme Court, this Court's original habeas jurisdiction *is* discretionary. Such discretion is conferred by both statute and rule. *See* 28 U.S.C. § 2242; S. Ct. R. 20.4(a). There is no similar provision in California law.

The simple fact is that the California habeas scheme does not vest an appellate court with discretion to decline to entertain an original habeas petition. Thus, to the extent that there is an analogy between habeas proceedings in the California Supreme Court and habeas proceeding in federal courts, the analogy is to proceedings in the federal *district* courts. Unlike federal appellate courts, the federal district courts have no discretion to refuse to entertain a habeas proceeding. *See Johnson v. Rogers*, 917 F.2d 1283 (10th Cir. 1990) (issuing writ of mandamus

compelling district court to determine petition). The discretion of the federal district courts is limited to the decision whether to issue the writ, not whether to entertain the application; a writ of habeas corpus is a writ of right once reasonable cause is shown. *Barrett v. Hunter*, 180 F.2d 510 (10th Cir.), *cert. denied*, 340 U.S. 897 (1950).

Thus, it is hardly surprising that not one of the repeated, emphatic assertions by petitioner and amici that the California original writ of habeas corpus is a ~~discreti~~onary writ is accompanied by authority supporting that assertion.[5] Although California caselaw is replete

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[5] The authority cited by petitioner (Petitioner's Brief at 30) is either irrelevant to the question presented or supportive of respondent's position. The discretionary policy of law of the case, like the state law definition of a "cause," are implicated only where a reviewing court issues a written opinion. *People v. Medina*, 6 Cal. 3d 484, 491 n.7 (1972); *People v. Pacini*, 120 Cal. App. 3d 877, 882-883 (1981); *Myers v. Ylst*, 897 F.2d 417, 423 n.7 (9th Cir. 1990); *LaRue v. McCarthy*, 833 F.2d 140, 143 n.2 (9th Cir. 1987). Thus, it is hardly surprising that these principles are not implicated when the court denies an original petition without citation or comment.

The Supreme Court's description of its practices and procedures, prepared for laypeople and "distributed to the public and the press," Supreme Court of California Practices and Procedures at V, does not purport to, and cannot, supplant the decisional law of the state. *People v. Connor*, 270 Cal. App.2d 630, 638 n.2 (1969), also cited by petitioner, confirms that habeas corpus in California is a " . . . 'writ of right' " whose "issuance" is discretionary. Of course, as respondent has demonstrated – and as *People v. Connor* confirms – the proper exercise of that discretion requires the court first to examine the bona fides of the claims presented in order to determine whether a prima facie entitlement to relief has been made.

(Continued on following page)

with discussion of a multitude of procedural reasons for refusing to issue the writ of habeas corpus, *see, e.g., In re Swain*, 34 Cal. 2d 300, 304 (1949) (facts not stated fully and frankly; delay in raising claim not satisfactorily explained); *In re Miller*, 17 Cal. 2d 734 (1941) (court will not entertain successive petitions making same claim absent change in facts or applicable law); *In re Waltreus*, 62 Cal. 2d 218, 225 (1965) (habeas corpus not a second appeal); *In re Dixon*, 41 Cal. 2d 756, 759 (1953) (habeas not substitute for appeal), discretion to decline review has never been cited as a reason in any California case. Standing in marked contrast is the number of cases discussing the discretionary nature of the federal original writ of habeas corpus. *See. e.g., Ex Parte Hudgings*, 249 U.S. 378 (1919); *Chaapel v. Cochran*, 369 U.S. 869 (1962); *Hayes v. Maryland*, 370 U.S. 931 (1962).

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Even petitioner's reliance on the dissent in *Myers v. Ylst* must fail, for the dissent recognized that minute order denials are denials on the merits "in the sense that they fail to indicate that the supreme court denied state habeas on the basis of procedural default." 897 F.2d at 427 n.1.

Amicus's assertion that the *"Michael E.* rule" supports its position, Brief Amicus Curiae of the Criminal Justice Legal Foundation at 16, is also misplaced. In *In re Michael E.*, 15 Cal. 3d 183, 193 n.15 (1975), the court simply disapproved, for practical reasons, the filing of an original petition in the supreme court where the Court of Appeal had decided the same issue in a published written opinion, and petitioner had the alternative of filing a petition for hearing. In a later case, the court granted an original writ where, as in this case, the writ had been denied without comment by the Court of Appeal. *In re Catalano*, 29 Cal. 3d 1, 7 (1981).

D. Despite the Superficial Appearance of Conflict, the Ninth Circuit's Decision Is Consistent With Other Circuit Court Decisions Involving "Pro Forma" Orders

Once the unique aspects of California habeas procedure are understood, the error of petitioner's assertion that the decision below is in conflict with the decision of other circuits becomes readily apparent.

Petitioner asserts that the opinion of the Fifth Circuit in its opinion in *Russell v. Lynaugh*, 892 F.2d 1205 (5th Cir. 1989), is in conflict with the decision below. However, the State of Texas has stated that the Ninth Circuit's ruling in *Nunnemaker v. Ylst* is fully consistent with Fifth Circuit authority and *Harris v. Reed*. *See Russell v. Collins*, No. 89-7679, Respondent's Opposition to Petition for Certiorari, p. 22. Furthermore, in *Edwards v. Butler*, 882 F.2d 160 (5th Cir. 1989), the Fifth Circuit, fully consistent with *Nunnemaker v. Ylst*, found that an unwritten state court order cannot create a procedural bar under *Harris v. Reed*. *See also Booker v. Lynaugh*, 872 F.2d 100 (5th Cir. 1980).

Contrary to petitioner's assertion none of the federal circuits has relied on 28 U.S.C. § 1257 or the cases construing that section to interpret a minute order denial by a state court of an original petition for habeas relief. Each of the cases[6] cited by petitioner dealt with a state court's denial of review of a lower court decision.

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[6] *Prihoda v. McCaughtry*, 910 F.2d 1379 (7th Cir. 1990); *Felton v. Barnett*, 912 F.2d 92 (4th Cir. 1990); *Coleman v. Thompson*, 895 F.2d 139 (4th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3344 (1990); *Harman v. Barton*, 894 F.2d 1268 (11th Cir. 1990); *Russell v. Lynaugh*, 892 F.2d 1205 (5th Cir. 1989); *Arce v. Smith*, 889 F.2d 1271 (2d Cir. 1989); *Evans v. Thompson*, 881 F.2d 117 (4th Cir. 1989); *Ellis v. Lynaugh*, 873 F.2d 830 (5th Cir. 1989).

Petitioner has in the past recognized the distinction between a petition for review and an original habeas petition.[7] In *McQuown v. McCartney*, 795 F.2d 807 (9th Cir. 1986), the state argued that the claimant had not exhausted state remedies in that he had not filed an original habeas petition with the California Supreme Court. The Ninth Circuit there held that "denial of a hearing of a court of appeal decision may be taken as an approval of the conclusion there reached, but not necessarily of all the reasoning contained in the opinion." *Id.* at 810. This decision was based on the rules of appeal in California which held that a denial may mean no more than that a ground which the court deems adequate for ordering a hearing has not been brought to its attention.

Petitioner argues that applying the Ninth Circuit's distinction of the state court's exercise of its original

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[7] In their briefing in *McQuown v. McCartney*, the state attorney general stated:

> The scope of the California Supreme Court's review is directly related to the mechanism by which the lower court's action is brought to its attention: while the filing of an original petition for writ of habeas corpus in the Supreme Court would allow that court to consider all of the raised issues pursuant to its authority under California Constitution, article VI, § 10 (original jurisdiction), it cannot be said the filing of a petition for hearing with that court necessarily results in a similar conclusion.

"Appellee's Response to Petition for Hearing En Banc" (9th Cir. Case No. 84-6289).

versus appellate jurisdiction to the facts in *Harris v. Reed*, this Court would have found "the failure of the Illinois Court to provide a plain statement would have been legally inconsequential." Petitioner's Brief at 21. This argument misconstrues the decision of the Ninth Circuit. They did not state that no decisions rendered in the course of the California Supreme Court's appellate function are judgments under *Harris v. Reed*. The Ninth Circuit stated only that a summary denial of a petition for review of a lower court decision is not a decision on the merits.

III.

ONE CANNOT CONCLUDE THAT A DENIAL OF RELIEF ON DIRECT APPEAL FOR PROCEDURAL REASONS WILL NECESSARILY PRODUCE THE SAME RESULT IN ORIGINAL HABEAS CORPUS WRIT PROCEEDINGS

The most common procedural bases for denials of habeas corpus petitions in California are: (1) the matter was raised and rejected on direct appeal[8]; (2) the matter could have been but was not raised on direct appeal[9]; (3) the identical issue was raised in a prior habeas corpus petition and neither additional facts were presented nor new law exists[10]; (4) a delay in raising the claim was not explained[11]; (5) the facts in the petition are not stated

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[8] Usually signalled in a minute order denial by a citation to *In re Waltreus*, 62 Cal. 2d 218, 225 (1965).

[9] Usually signalled by a citation to *In re Dixon*, 41 Cal. 2d 756, 759 (1953).

[10] Usually signalled by a citation to *In re Miller*, 17 Cal. 2d 734, 735 (1941).

[11] Usually signalled by a citation to *In re Swain*, 34 Cal. 2d 300, 304 (1949) or *In re Stankewitz*, 40 Cal. 3d 391, 397 n.1 (1985).

with sufficient particularity[12]; and (6) the issue is not cognizable on habeas corpus.[13] Yet for each of these policies or rules there are numerous exceptions in which the rule or general policy will not be applied and cases in which the rule has not been applied although no exception is applicable. Two examples graphically illustrate respondent's point.

Example 1: With respect to the rule against successive habeas corpus petitions absent new facts or a change in the law,[14] the California Supreme Court has noted:

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[12] Usually signalled by a citation to *In re Swain, supra.*

[13] The case used to signal this problem, which in some circumstances is analogous to procedural default in that relief is denied for independent reasons of state law, apart from the claim's merits, will vary depending upon the issue raised. For example, in denying a petition which challenges the sufficiency of the evidence, the Court will typically cite *In re Lindley*, 29 Cal. 2d 709, 723 (1947) (sufficiency of evidence not cognizable on habeas corpus). In denying a petition challenging the legality of a search and seizure, the Court will typically cite *In re Sterling*, 63 Cal. 2d 486, 487 (1965) (search and seizure claims are not cognizable on habeas corpus).

[14] Although this rule is frequently stated as a prohibition against successive habeas corpus petitions, the correct statement of the rule is that a petition for habeas corpus based on the same grounds as those of a previously denied petition will be denied absent a change in the law or the presentation of new facts which substantially affect petitioner's rights. *See, e.g., In re Martin*, 44 Cal. 3d 1, 27 n.3 (1987), in which the California Supreme Court granted habeas corpus relief on a second habeas corpus petition and after affirmance on appeal because "new facts [were] alleged in the petition and supported by exhibits of recent date." *Id.*

"Our policy is to deny a new application unless there has been a change in the facts or law [cites], but this policy is discretionary. [cites]." *In re Bevill*, 68 Cal. 2d 854, 863 n.9 (1968). In *Bevill*, the court had denied an earlier habeas corpus petition in 1967, but issued an order to show cause and ultimately granted relief slightly over a year later.

Consequently, one cannot, contrary to petitioner's position, assume with confidence that a second habeas corpus petition will be automatically denied as an inappropriate successor or that a denial of a second habeas corpus petition, following an earlier one denied for reasons of state law or procedural default, is based on the same state law or procedural reasons. This is particularly true where the first habeas corpus petition was denied for an independent state reason or violation of state procedural rule which could be remedied by the filing of the second habeas corpus petition. In fact, a "silent" minute order denial following an earlier denial for specified reasons of default suggests quite the opposite, i.e., that upon reexamination the Court wishes now to forgive the earlier default either because petitioner has corrected the problem or because upon reexamination the failure to reach the merits was misguided.

Example 2: Although the general rule is that habeas corpus may not be used as a second appeal (i.e., where the issue was raised and rejected on appeal), that rule may be overlooked "where 'special circumstances' are deemed to exist", *In re Coughlin*, 16 Cal. 3d 52, 55 (1976), or where denials of the right to counsel are involved because these issues are cognizable on habeas corpus whether or not they are raised on appeal, *In re Hochberg*, 2 Cal. 3d 870, 875 (1970), or where the sentence imposed

upon defendant exceeded the authorized maximum, *In re Huffman*, 42 Cal. 3d 552, 555 (1986), or where intervening law justified relief, *In re Hill & Saunders*, 71 Cal. 2d 997 (1969).

In respondent's case, for example, the California Supreme Court denied respondent's earlier petition with a citation to *In re Swain*, which often is meant to indicate that petitioner did not explain any delay in presenting the claim. Respondent, in his renewed state habeas corpus petition, explained the reason for his delay. J.A. 95. Properly understood in this light, the Court's decision to remove the citation to *In re Swain* is not only comprehensible but is both logical and fatally damages petitioner's position that once a procedural bar exists it will invariably not be forgiven. Similarly, the earlier denial contained a citation to *In re Waltreus*, which often indicates the issue was already presented on direct appeal. However, in the second petition, respondent expressly pointed out to the Court that he was relying on case law decided after his appeal (i.e., new law). Accordingly, the removal of the *In re Waltreus* citation is similarly understandable.

IV.

APPLYING THE "PLAIN STATEMENT" RULE TO MINUTE ORDER DENIALS OF STATE HABEAS CORPUS IS CONSISTENT WITH THE RATIONALE BEHIND *HARRIS v. REED*

A. *Harris v. Reed* Applies to Pro Forma Denials

Petitioner argues that the rule of *Harris v. Reed* does not apply to a minute order denial of state habeas relief where a procedural default was found in an opinion from

a prior proceeding, arguing that only state "opinions" are "judgments" within the meaning of *Harris v. Reed*. This argument should be rejected.

Harris v. Reed and its predecessors instruct that the mere existence of a basis for a state procedural bar is not talismatic. If that were otherwise there would have been no need for this Court to decide *Harris v. Reed, supra,* and *Caldwell v. Mississippi,* 472 U.S. 320 (1985).

Furthermore, the *Harris* opinion makes clear that this Court intended its ruling to apply not only to state-court opinions, but also to state-court pro forma orders. In *Harris v. Reed,* 489 U.S. at 265 n. 12, this Court stated:

> [A] state court that wishes to rely on a procedural bar rule in a one-line pro forma order can easily write that "relief is denied for reasons of procedural default." Of course, if the state court under state law chooses not to rely on a procedural bar in such circumstances, then there is no basis for a federal habeas corpus court's refusing to consider the merits of the federal claim.

Thus, this Court's decision clearly mandated the Ninth Circuit's holding below that the California Supreme Court's failure to state that relief was denied on procedural grounds in the minute order denial requires federal review of the merits of the claim.

B. There Can Be No Presumption That a Minute Order Denial of an Original Habeas Petition Relates Back to Another Court Proceeding

Petitioner suggests that even if the California Supreme Court's silent denial of an original habeas

petition were otherwise an ambiguous judgment within the meaning of *Harris v. Reed,* in the procedural context of this case there is no ambiguity. After all, petitioner argues, the state court opinion on direct appeal applied an unambiguous procedural default, and the state supreme court's pro forma denial of respondent's first original habeas petition included citations to *Waltreus* and *Swain*. Petitioner cites no authority for the proposition that a minute order denial of an original state habeas petition relates to any other court proceedings. More importantly, petitioner's position is not actually that the silent denial is unambiguous; it is simply a suggestion of the manner in which the ambiguity can be resolved. For petitioner to state the premise is to fly directly in the face of *Harris v. Reed.*

In *Harris v. Reed,* this Court expressly declined to adopt a presumption that a state court's judgment rests on procedural grounds and rejected the assertion that the federal court should look back to prior court proceedings to assess the state court's intention to the extent that this is possible. *Harris v. Reed* and *Michigan v. Long* constitute component parts of a body of jurisprudence designed both to reduce the intrusiveness of federal review of claims originating in the state courts and to lessen the burden placed on federal courts. *See Michigan v. Long,* 463 U.S. 1032, 1040 (1983). Adopting petitioner's proposed rule would frustrate *Harris v. Reed,* if not contradict it, by returning the federal courts to second-guessing the state court's determinations of state law.[15]

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[15] In *Harris v. Reed,* Justice O'Connor, in a concurring opinion, stated that federal courts may properly inquire into

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The issue of state procedural default cannot be raised in the first instance in federal court. *Ulster County Court v. Allen*, 442 U.S. 140 (1979). This is a determination that must be made by the state courts. Thus, it is reasonable to require the state court to plainly state its intention to impose a procedural default.

Applying the "plain statement" rule does not foreclose a state court from relying on a state procedural bar. Where a claim has been presented to the state court in a habeas petition, it is not unreasonable to require the state court to be explicit if, when it denied the petition, it intended to rely upon a procedural default. Requiring a state that wishes to rely on a procedural bar rule to say so does not interfere unduly with state judicial decisionmaking. A state court that wishes to rely on a procedural bar

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the availability of state remedies in determining whether claims presented in a petition for habeas corpus have been properly exhausted in the state courts. *Harris v. Reed*, 489 U.S. 255, 269 (1989). A discussion as to the interests served by the exhaustion rule followed. Justice O'Connor concluded:

> To protect these interests we have held that where a federal habeas petitioner raises a claim which has *never* been presented in any state forum, a federal court may properly determine whether the claim has been procedurally defaulted under state law, such that a remedy in state court is "unavailable" within the meaning of § 2254(c).

Id. (emphasis in the original).

In the situation now before this Court, the question of available remedies in the state courts is not at issue. Furthermore, this Court is not presented with the situation where the state court was never given an opportunity to address the issue.

rule in a one-line pro forma order easily can write "denied – procedural default." *See Harris v. Reed*, 489 U.S. at 265 n.12.

Petitioner's proposal would require the federal courts in the large number of cases coming to them following a silent denial of an original state habeas corpus petition to examine the state law and record to determine whether a state procedural bar was applicable and was in fact applied. Such a task is actually more formidable in the context of a silent denial that an ambiguous opinion. An ambiguous opinion provides at least some insight into the state court's reasons for denying relief. A pro forma denial leaves the federal courts without any guidance as to the basis of the state court's decision. The problem of determining whether a potential procedural bar was applied or waived, if not left to guesswork, may escalate to unmanageable proportions. In the context of California habeas law, as discussed earlier, this is so even where there has been reliance on procedural default in an earlier proceeding.

The purpose of the *Harris v. Reed* rule is to provide for an appropriate distribution of the burden of determining procedural default between state and federal courts. It would be ironic indeed to suggest that the state courts could refuse to assume any of the burden and legitimately shift it entirely to the federal courts by the simple expedient of failing to discuss the issue. Just as in *Harris* this Court found it consistent with the principles of comity to address the merits of a federal claim when the last state court to render a judgment in the case has not clearly discussed a procedural bar, this Court should hold that the same is true when the last state court to render a

judgment in the case has not discussed the procedural bar at all.

V.

APPLYING *HARRIS v. REED* TO MINUTE ORDER DENIALS BURDENS STATE INTERESTS ONLY MINIMALLY, IF AT ALL, AND THE BENEFITS ARE SUBSTANTIAL

Petitioner's position that the Ninth Circuit's decision encourages a "war of attrition" or is a trap for the state courts is unrealistic, at least under California law. In California, a habeas corpus petitioner is required to set forth the direct appeal history of the case *and* to state whether any prior habeas corpus petitions have been filed and what the results were of the earlier petitions, Cal. Penal Code § 1475.[16] These rules requiring full

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[16] Petitioner warns that unless his position is adopted a reasoned opinion of the California Supreme Court denying relief for reasons of procedural default could be swept away by a state trial court issuing a denial of habeas relief, which minute order is subsequently casually endorsed by the California Supreme Court. He also suggests that if the trial court imposed a procedural bar the California Supreme Court could inadvertently transform it into a decision on the merits by issuing a minute order denial. Petitioner's position rests on an assumption that the reasons for the prior rulings will be hidden from the California Supreme Court, that its orders in habeas corpus actions are not the product of careful study by the court staff, and that the California Supreme Court would not deem it appropriate to remove a previously imposed procedural bar.

As noted above, each one of these assumptions is untrue. When an original habeas corpus petition is before the Court, it is aware of the prior direct appeal history and prior habeas corpus history. Thus, it would be difficult to conceal a prior procedural default from the Court.

procedural disclosure exist for a simple reason – to allow the Court to obtain and review the earlier pleadings, orders, and internal memoranda written by court staff in order to determine what action should be taken on the current request. Notably, in this case respondent fully apprised the California Supreme Court of the history of the case.

Petitioner suggests that somehow Mr. Nunnemaker created a problem with successive petitions in the courts. This argument ignores first that Mr. Nunnemaker filed a second petition in the state court only because he was directed to do so by the federal district court. Secondly, this argument ignores the fact that California prisoners are entitled by state law to file original petitions for habeas relief in the superior, appellate, and state high courts. If this is in fact too burdensome on the state courts, the state has the power to remedy the situation. It can pass legislation amending this procedure.

In any event, adopting petitioner's proposal will not cure the problem of prisoners filing successive state petitions for habeas relief if that problem does in fact exist. The vast majority of habeas petitions in both the state courts and federal courts are filed in propria persona. Not applying the plain statement rule will not limit the habeas petitions which are filed. However, applying the plain statement requirement may well lessen the work required by all courts.

There are three options for dealing with silent denials of state habeas petitions: (1) the federal court can send the case back to the state court for clarification of its decision; (2) the federal court can presume procedural default and dismiss the habeas petition; or (3) the plain statement rule can be applied. This Court has recognized

that the practice of vacation and continuance for clarification is unsatisfactory both because of the delay and decrease in efficiency of judicial administration. *Michigan v. Long*, 463 U.S. at 1039. Also, in *Michigan v. Long*, this Court declined to dismiss the case or require the state court to reconsider its decision solely because of a possibility that an adequate and independent state ground supported the judgment. Rather, this Court found that it had jurisdiction in the absence of a plain statement that the decision in the state court rested on adequate and independent state ground.

Furthermore, a presumption that the state court relied on a procedural default found in an earlier proceeding, when it summarily denied the habeas petition, may in fact be wrong. As noted *supra*, procedural defaults are sometimes forgiven by the state court, and a decision on the merits is made. It should also be noted, as petitioner has also put forth, that in denying an original petition for habeas relief, the justices of the California Supreme Court need not agree on the reasons for such denial.[17] If a habeas petition is denied without a

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[17] However, petitioner's implication that a minute order denial cannot be considered a denial on the merits because each judge could have a different reason for his or her vote must be firmly rejected as wrong. Any order issued on a petition for review or an original writ must garner consent by a majority of the justices. Thus, if four justices wished to deny an original habeas corpus petition for reasons of procedural default, an order so stating (i.e., citing procedural authority) would be the order issued by the court. If a judge wished to publicly indicate his disagreement (i.e., in effect if he wished to publicly dissent), he could so state. Recently, for example, in *In*

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consensus that there is a procedural default, a presumption that a summary denial was based on a procedural default would clearly be wrong.

Petitioner ignores that the state court is the controlling entity in this situation. It has control over the content of the decision denying a petition for habeas relief. By providing a plain statement, the state court will determine whether federal habeas review is proper.

When the Court is dealing with individual liberty, ambiguity should not be tolerated. The jurisdiction of this Court on habeas review is broader than on direct review. *Fay v. Noia*, 372 U.S. 391 (1963). "[I]n considering petitions for relief under 28 U.S.C. § 2254, the federal courts do not review state court decisions to determine if the states have gone too far in protecting the rights of their citizenry, but rather perform the core function of vindicating federally protected rights." *Harris v. Reed*. 489 U.S. 255, 267 (1989) (Stevens, J., concurring).

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re Moore, S0016650 (filed Nov. 14, 1990), one California Supreme Court justice dissented from the minute order denial of an original habeas corpus petition, registering his opinion that an order to show cause should issue. Conversely, a minute order denial without any citation cannot be issued unless a majority of the justices endorse that order. Consequently, a denial without any citation of authority is not indecipherable in the sense that it could rest on reasons of procedural default. Had a majority of the court wished to deny a petition for reasons of default, it would have.

CONCLUSION

The *Harris v. Reed* approach provides state judges with a clear opportunity to develop state jurisprudence unimpeded by federal interference and will also preserve the integrity of federal law. *See Michigan v. Long*, 463 U.S. at 1042. There is no reason to depart from the "plain statement" rule of *Michigan v. Long*, *Caldwell v. Mississippi*, and *Harris v. Reed*.

– The plain language and history behind *Harris v. Reed* compel a conclusion that the federal court is not foreclosed from reaching the merits of respondent's case. Quite simply, the last state court rendering a judgment in this case did so with a minute order denial of the original petition for habeas relief. Such denial cannot and does not constitute a clear and express statement that the state court based its denial on a procedural bar. Absent such a clear and express statement, the federal court must proceed to the merits of the claim.

For the reasons expressed herein, it is respectfully submitted that the decision of the Ninth Circuit be affirmed.

Respectfully submitted,

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FOR ARGUMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

EDDIE S. YLST, WARDEN

Petitioner,

v.

OWEN DUANE NUNNEMAKER

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLOSING BRIEF FOR PETITIONER

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I.

EXTENDING THE "PLAIN STATEMENT" RULE TO A STATE SUPREME COURT'S DECISION NOT TO DECIDE UNDULY BURDENS STATE PROCEDURE.

Respondent insists that extension of the "plain statement" rule to summary denials of habeas corpus petitions will impose "no unmanageable burden on the California Supreme Court" because "[t]his rule has been applied consistently in the Ninth Circuit with the approval of the state. *See, e.g., McQuown* v. *McCartney*, 795 F.2d

807 (9th Cir. 1986); *LaRue* v. *McCarthy*, 833 F.2d 140 (9th Cir. 1987); *Kim* v. *Villalobos*, 799 F.2d 1317 (9th Cir. 1986)." (Resp. Br. at 5, 7.) According to respondent, since *Harris* v. *Superior Court*, 500 F.2d 1124 (9th Cir. 1974), *cert. denied*, 420 U.S. 973 (1975), "[b]oth the California Supreme Court and the Ninth Circuit have recognized, without objection by the state attorney general, that a minute order [summary] denial of state habeas relief will be treated as a determination on the merits." (Resp. Br. at 4.) As we shall show, none of these decisions held that a state court had waived a petitioner's procedural default. In fact, the state has accepted a Ninth Circuit *exhaustion* rule, not the federal court's characterization of state supreme court practice, nor its conclusion that our high court regularly waives procedural defaults.

In 1974, the Ninth Circuit reviewed state habeas corpus procedure in California. In *Harris* v. *Superior Court*, *supra*, the federal appellate court confronted the question whether a federal habeas petitioner had exhausted all available state remedies when the California Supreme Court denied his state habeas application without explanation. If the state court's silence were understood to imply that the petition was procedurally defective, the state prisoner might be placed in a legal limbo, unable to obtain a ruling on the merits from the highest state court despite repetitive petitions, yet unable to cross the exhaustion threshold of the federal district court. That outcome advanced no legitimate interest of the state or the petitioner. In that context, the Ninth Circuit announced its "postcard denial" rule:

> "[W]hen the California Supreme Court denies a habeas corpus petition without opinion or citation, or otherwise decides on the merits of the petition, the exhaustion requirement is satisfied." 500 F.2d at 1128-1129.

Harris v. *Superior Court* might have been explained on the ground that the purpose of the exhaustion doctrine, minimizing federal-state friction "by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights," *Duckworth* v. *Serrano*, 454 U.S. 1, 3 (1981), was fulfilled by a habeas petition which afforded the highest state court an *opportunity* to entertain the applicant's claims, albeit in a procedurally imperfect context. Cf. *Turner* v. *Compoy*, 827 F.2d 526 (9th Cir. 1987), *cert. denied*, 489 U.S. 1059 (1989); *Thompson* v. *Wainwright*, 714 F.2d 1495, 1505 (11th Cir. 1983). Unfortunately, the Ninth Circuit instead chose to characterize the state court's post-1969 summary denials as rulings on the merits, a characterization given effect as a presumption. However, neither the Ninth Circuit nor the state could have foreseen any procedural default implications in *Harris*, for it was decided three years before *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). See also *Thompson* v. *Procunier*, 539 F.2d 27, 28 (9th Cir. 1976).

In another exhaustion case, *McQuown* v. *McCartney*, *supra*, 795 F.2d 807, the Ninth Circuit declined to extend the presumption created in *Harris* v. *Superior Court* to petitions for hearing in the California Supreme Court following the denial of habeas relief by the intermediate state appellate court. While the Ninth Circuit treated our supreme court's original habeas corpus jurisdiction as

mandatory in *Harris*, *McQuown* acknowledged that the state high court exercised discretionary appellate jurisdiction in habeas cases. Procedural default was not discussed in *McQuown*. Of course, it is inconceivable that by denying a review petition that failed to satisfy the federal habeas exhaustion requirement, the California Supreme Court could be held to have waived any procedural default. *McQuown's* present significance arises from the Ninth Circuit's intimation that *Harris* v. *Reed*, 489 U.S. 255 (1989), expands federal habeas jurisdiction by erasing the distinction drawn in *McQuown*. *Nunnemaker* v. *Ylst*, 904 F.2d 473, 476 n.4 (9th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3344 (1990).

Kim v. *Villalobos*, *supra*, 799 F.2d 1317, is an exhaustion case, too. The district court dismissed Kim's federal habeas petition for failure to exhaust available state remedies after the California Supreme Court had denied his state habeas petition, citing *In re Swain*, 34 Cal.2d 300, 209 P.2d 793 (1949). *Swain* holds that because "vague, conclusionary allegations . . . are insufficient to warrant issuance of the writ," a denial for this reason "is not a ruling on the merits." 34 Cal.2d at 303-304, 209 P.2d 793. *Harris* v. *Superior Court* declared that a citation to *Swain* reflected a denial on procedural grounds. 500 F.2d at 1128. However, twelve years later, in *Villalobos*, the Ninth Circuit rejected the state's claim that "citation of *Swain* establishes *per se* that Kim has failed to exhaust." 799 F.2d at 1319. *Villalobos* explained that if a state petitioner alleges his federal claims as specifically as possible, a denial on the basis of *Swain* is not on the procedural ground of insufficient particulars, but in effect constitutes a rejection on the merits, thereby

exhausting the underlying claim. *Id*. at 1319-1320. Since the petitioner, but not the state court, knows whether additional facts can be supplied, the California Supreme Court knows that it denied the petition, but only the petitioner knows why. *Kim* v. *Villalobos* addressed only the question whether the petitioner had satisfied the exhaustion requirement; the court did not discuss the procedural default doctrine, much less hold that any state court had waived any procedural default.

LaRue v. *McCarthy*, *supra*, 833 F.2d 140, is neither an exhaustion case nor a procedural default case. On federal habeas corpus, LaRue claimed that "the California Supreme Court had denied him equal protection by rejecting his petition for a writ of habeas corpus, and thereby refusing to apply retroactively a recent [state] supreme court case." *Myers* v. *Ylst*, 897 F.2d 417, 427 n.1 (9th. Cir.) (Kozinski, J., diss.), *cert. denied,* 111 S.Ct. 212 (1990). The Ninth Circuit noted that "LaRue has not cited any instance in which California has applied [its recent decision] retroactively," adding that prospectivity "might be unfair, but it is not unconstitutional." *LaRue* v. *McCarthy*, *supra*, 833 F.2d at 142. The Ninth Circuit then further, and unnecessarily, held that the California Supreme Court's silent denial of LaRue's habeas petition constituted a ruling on the merits, *i.e.*, the state high court had decided not to apply its new rule retroactively to any petitioner. *Id*. The federal appeals court reached this conclusion although LaRue pointed out that decisions of the California Supreme Court must "be in writing with reasons stated" (see Cal. Const., art. VI, § 14), and cited state decisional law refusing res judicata effect to summary denials of habeas corpus petitions. 833 F.2d at 143 n.2.

Contrary state law notwithstanding, the Ninth Circuit withheld habeas relief from LaRue by invoking the presumption created in *Harris* v. *Superior Court* to afford state prisoners access to a federal forum.

Respondent's authorities do not reflect two decades of state acquiescence in the Ninth Circuit's mischaracterization of California Supreme Court decisions not to decide claims raised in state habeas corpus petitions as decisions on the merits. What the state *has* accepted is the exhaustion rule adopted in *Harris* v. *Superior Court*. While some Ninth Circuit cases "unfortunately, have perpetuated the confusion between 'waiver' and 'exhaustion,'" California Continuing Education of the Bar, *Appeals and Writs in Criminal Cases* (December 1988 Supp.), p. 145, our vital interests in enforcing state procedural rules require California to resist such confusion and, for procedural default purposes, to reject the rationale of *Harris* v. *Superior Court*. "The exhaustion requirement . . . serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." *Duckworth* v. *Serrano*, *supra*, 454 U.S. at 3. However, "[t]he interest in encouraging state court cooperation in the process of vindicating federal constitutional rights is a distinctly federal one," Note, 97 Harv. L. Rev. 511, 523 (1983), for to the extent that state courts implement federal rights, the exhaustion requirement relieves federal court dockets and reduces federal habeas reversals of state court convictions, thereby minimizing state hostility towards federal courts. In contrast, the procedural default rule vindicates a state's vital interests in the integrity of its

trial and appellate procedures and in the finality of its judgments. *See Wainwright* v. *Sykes, supra*, 433 U.S. at 88-89; *Klein* v. *Harris*, 667 F.2d 274, 285 (2d Cir. 1981). It is no accident that federal courts which reject a state's affirmative waiver of the exhaustion requirement, *see, e.g., Batchelor* v. *Cupp*, 693 F.2d 859 (9th Cir. 1982) (disapproving Oregon Attorney General's routine concession of exhaustion of claims never presented to highest state court), will hold procedural defaults waived by a state's failure to claim them at the earliest opportunity. *See, e.g., Hughes* v. *Idaho State Board of Corrections*, 800 F.2d 905, 906 n.1 (9th Cir. 1986); *Batchelor* v. *Cupp*, *supra*, 693 F.2d at 863-864. Instead, such decisions show where true federal and state interests lie.

Respondent's account of the interaction between Ninth Circuit and California Supreme Court habeas corpus practices is incomplete. Perhaps the first Ninth Circuit opinion to transform our state high court's refusal to entertain a habeas petition into a forfeiture of a procedural default was *Maxwell* v. *Sumner*, 673 F.2d 1031, (9th Cir.), *cert. denied*, 459 U.S. 976 (1982). Maxwell was denied self-representation at a state trial conducted before *Faretta* v. *California*, 422 U.S. 806 (1975). He appealed on this ground to the California Court of Appeal, which affirmed his conviction. Maxwell then unsuccessfully petitioned for hearing in the California Supreme Court without raising his self-representation claim. Subsequently, Maxwell did raise his self-representation claim by habeas corpus petition to the California Supreme Court, which denied his application with a citation to *In re Waltreus*, 62 Cal.2d 218, 225, 397 P.2d 1001, 1005 (1965), which holds

that arguments rejected on appeal ordinarily cannot be reviewed on habeas corpus.[1/]

The state claimed that Maxwell had procedurally defaulted at the appellate level "by failing to raise the issue on direct appeal to the California Supreme Court." 673 F.2d at 1033. The Ninth Circuit held that California had no procedural rule requiring a defendant to seek direct review in the California Supreme Court in order to preserve an issue for state habeas review, *id.*, although California's highest court had long held habeas corpus unavailable "where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." *In re Dixon*, 41 Cal.2d 756, 759, 264 P.2d 513 (1953). Without discussing *Dixon*, the Ninth Circuit added, "[m]ore importantly, if such a rule does exist, the California Supreme Court did not invoke it in denying Maxwell's habeas petition; rather, the court indicated, by citing *Waltreus*, that petitioner's claim had been rejected on its merits by the California Court of Appeal." 673 F.2d at 1034-1035. Perhaps aware that this rationale did not meet the state's objection that Maxwell had bypassed the *state supreme court* on direct review, the Ninth Circuit further added: "Moreover, we believe that Maxwell effectively raised his self-representation claim to the California Supreme Court" by petitioning for hearing on *other* grounds. *Id.* at 1034 n.1. Since, by granting a hearing, the California Supreme Court acquired

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1. Until *Maxwell*, *Waltreus* had been widely understood as a procedural ground for denial, within the meaning of *Harris* v. *Superior Court*. California Continuing Education of the Bar, *supra*, at 141.

jurisdiction not merely over the questions presented in the hearing petition, but over the entire case, a petition which raised no federal questions "fairly presented" all federal questions resolved by the intermediate state appellate court, according to the Ninth Circuit.[2/] *Id.*

In effect, *Maxwell* v. *Sumner* held that no state procedural rule supported a default, but that if there were such a rule, the defendant had complied with it and, if he had not complied, the intermediate state appellate court had waived the default on direct review. *Maxwell* thus furnished no precedent for transforming our state supreme court's unexplained denial of a habeas petition into a waiver of any procedural default. Nor may the state be said to have acquiesced in the federal ruling, certiorari having been sought.

Lewis v. *Borg*, 879 F.2d 697 (9th Cir. 1989), not cited by respondent, appears to be the only Ninth Circuit decision holding that the California Supreme Court's silent denial of a habeas corpus petition waived a state court procedural default. Lewis failed to raise his claim of prosecutorial misconduct on direct appeal to the California Court of Appeal. Thereafter, he did present this claim to the California Supreme Court by a petition for writ of

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2. The Ninth Circuit recently repudiated this portion of *Maxwell* in light of a new California Supreme Court rule providing that "'[o]nly the issues set forth in the petition and answer or fairly included in them need be considered by the court.'" *McGuire* v. *Estelle*, 902 F.2d 749, 753 n.1 (9th Cir. 1990), *pet. for cert. pndg.*, 59 U.S.L.W. 3503 (1990).

habeas corpus, which was denied without citation of authority or other explanation.

On federal habeas corpus, the district court found that the petitioner's failure to challenge the prosecutor's actions on direct appeal was a procedural default barring federal review on the merits. The Ninth Circuit reversed:

> "We have held that such a summary denial of a habeas corpus petition by the California Supreme Court constitutes a decision on the merits, *Harris* v. *Superior Court*, 500 F.2d 1124, 1128 (9th Cir. 1974), *cert. denied*, 420 U.S. 973, . . .(1975), and as such, satisfies the requirement that a habeas petitioner exhaust all state remedies before seeking federal habeas relief. *Id.* at 1127-28. Therefore, Lewis did exhaust his state remedies and the district court erred in finding procedural default." 879 F.2d at 698 (footnote deleted).

Regrettably, the Ninth Circuit's misapplication of its "postcard denial" exhaustion rule to forfeit a state procedural default was not resisted by the state in *Lewis* v. *Borg*. *Id.* at 698 n.1. However, California's alleged twenty-one-year history of acquiescence, (Resp. Br. 5-6), consists of this single case.[3/] Within months, California denounced *Lewis* v. *Borg* in this Court as "a blueprint for

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3. Of course, in a particular case, the state's interest may be best served by waiving a procedural default. The Ninth Circuit has observed that "[t]hese questions, when raised in the district court, are almost always more complicated and time consuming than are the merits of the petitioner's federal claim." *Batchelor* v. *Cupp*, *supra*, 693 F.2d at 864.

circumventing [the] state's direct appeal procedure on federal questions" and as promising forgiveness of a state prisoner's "procedural default at trial . . . as well." *Williams* v. *McCarthy*, No. 89-6043, Response in Opposition, at 24.

In the present case, the state's petition for rehearing not only challenged the Ninth Circuit's application of *Harris* v. *Reed*, *supra*,[4/] but sought en banc reconsideration of *Lewis* v. *Borg* and *Harris* v. *Superior Court*. We explained that, to the state, application of the "postcard denial" presumption is as intolerable in the procedural default context as it is acceptable in the exhaustion of remedies context. (Rehrg. Pet. at 4.) We explained, too, that the rulings in this case and in *Lewis* v. *Borg* invite defendants to withhold their federal claims from our state trial and appellate courts, thereby undermining the integrity of state procedure and the finality of state judgments, and effectively transforming a federal habeas court into a federal appeals court with jurisdiction to review state criminal convictions. (Rehrg. Pet. at 9-12.) We emphasized that the Ninth Circuit's rulings had required the California Supreme Court to undertake an unmanageable increase in its workload or, as to federal claims, sacrifice state procedural rules. *Id.* at 12. Finally, we stressed that comity is not advanced by a federal judicial presumption that requires Californians to presume,

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4. This was the first reference by either party to this Court's very recent opinion in *Harris* v. *Reed*. Nevertheless, the Ninth Circuit found this case "appropriate for submission without oral argument. . . ." *Nunnemaker* v. *Ylst*, *supra*, 904 F.2d at 473.

inter alia, that the California Supreme Court regularly violates a state constitutional command that its decisions "shall be in writing with reasons stated," Cal. Const., art. VI, § 14; *Myers* v. *Ylst*, *supra*, 897 F.2d at 426-427 (Kozinski, J., diss.), and occasionally violates our state constitutional separation of powers provision, Cal. Const., art. III, by impliedly refusing to enforce procedural and evidentiary rules enacted by our Legislature. See, *E.g.*, Calif. Evid. Code, §§ 353 and 354; *In re Lance W.*, 37 Cal.3d 873, 891, 694 P.2d 744 (1985); *People* v. *Johnson*, 68 Cal.2d 646, 657, 441 P.2d 111 (1968).

The Ninth Circuit merely presumes that an unexplained denial by the California Supreme Court is on the merits of a habeas petition. *Turner* v. *Compoy*, *supra*, 827 F.2d at 529. Respondent insists that this presumption is empirically valid. Of the 898 habeas corpus petitions the California Supreme Court denied in 1989, respondent notes, "550 were denied without explanation. The rest were denied with citations to one or more cases signalling procedural defect." (Resp. Br. at 8.) From these data, respondent infers that "approximately 39% of the time the Court determined that it was appropriate to deny relief for reasons of procedural default," *id.*, but that far more often our highest state court "wished to afford its citizens full review of federal constitutional claims in federal court, . . . by issuing an unadorned denial." (Resp. Br. at 6.)

Respondent's argument fails to distinguish a "procedural defect" in the habeas petition itself from a "procedural default" in the earlier trial or appeal. The California Supreme Court observes this distinction, however. A review of our state high court's 1989 habeas

corpus denial orders[5] discloses that of the 348 denials accompanied by case citations, 155 denials cited only *In re Swain*, 34 Cal.2d 300, 209 P.2d 793 (1949). *Swain* was cited with at least one other decision in another 112 denial orders. Whatever *Swain* may mean to the Ninth Circuit, compare *Harris* v. *Superior Court*, *supra*, 500 F.2d at 1128, with *Kim* v. *Villalobos*, *supra*, 799 F.2d at 1319, it is clear what *Swain* means to the California Supreme Court:

> "[O]ur determination that the vague, conclusionary allegations of the present petition are insufficient to warrant issuance of the writ is not a ruling on the merits of the issues which the petitioner has attempted to raise [citations]. We are entitled to and do require of a convicted defendant that he allege with particularity the facts upon which he would have a final judgment overturned and that he fully disclose his reasons for delaying in the presentation of those facts." *In re Swain*, 34 Cal.2d at 303-304, 209 P.2d 793.

A citation to *Swain* reflects neither a ruling on the merits nor a claim of procedural default; instead, "[t]his procedural requirement . . . simply demands of [petitioner] a measure of frankness in disclosing his factual situation." *Id.* at 304, 209 P.2d 793. Thus, the final sentence of *Swain* states, "The application for the writ is denied without prejudice to the filing of a new petition which shall meet the requirements above specified." *Id.*

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5. These orders are included in the California Supreme Court's minutes, regularly published in the California Official Reports Advance Sheets.

In 71 habeas denials in 1989, our state supreme court cited *In re Waltreus*, 62 Cal.2d 218, 397 P.2d 1001 (1965), either exclusively or in conjunction with other authority, including *Swain*. Our state court's internal page cites to *Waltreus* demonstrate that it is invoking the principle that "habeas corpus ordinarily cannot serve as a second appeal" for "arguments that were rejected on [the first] appeal. . . ." *Id.* at 225, 397 P.2d 1001. In the same year, 60 high court habeas denials cited *In re Miller*, 17 Cal.2d 734, 112 P.2d 513 (1941), alone or with other cited authorities. *Miller* holds that the court will not entertain successive petitions alleging the same claims absent intervening change in the facts or applicable law. *Id.* at 735, 112 P. 2d 513. *Waltreus* and *Miller* cannot be said to bar consideration of the merits of the underlying claims, since these decisions foreclose only claims that have been heard and rejected.

In California, habeas corpus may be used to challenge conditions of confinement. In denying 32 habeas petitions in 1989, the California Supreme Court cited *In re Dexter*, 25 Cal.3d 921, 603 P.2d 35 (1979). *Dexter* is not a procedural default case, but holds that "[a]s a general rule, a litigant will not be afforded judicial relief unless he has exhausted available administrative remedies." *Id.* at 925, 603 P.2d 35. Of course, "the 'requirement of exhaustion of the appellate or other remedy . . . is merely a discretionary policy governing the exercise of the reviewing courts' jurisdiction to issue the writ.'" *In re Black*, 66 Cal.2d 881, 887, 428 P.2d 293 (1967); *see e.g., In re Hillery*, 202 Cal.App.2d 293, 294, 20 Cal.Rptr. 759 (1962).

On 25 occasions in 1989, the California Supreme Court denied habeas corpus petitions with citations to *In*

re Lindley, 29 Cal.2d 709, 723, 177 P.2d 918 (1947), which explained:

> "Upon habeas corpus, ordinarily it is not competent to retry issues of fact or the merits of a defense, such as insanity, and the sufficiency of the evidence to warrant conviction of the petitioner is not a proper issue for consideration. [Citations.] Nor is habeas corpus an available remedy to review the rulings of the trial court with respect to the admission or exclusion of evidence, or to correct other errors of procedure occurring on the trial."

Lindley and other decisions confining the scope of state habeas corpus are not forfeiture rules. *Lindley's* prohibition against claims of insufficient evidence, for example, applies equally to petitioners who challenge the sufficiency of the evidence for the first time and to petitioners who have raised the same claim at every prior opportunity. More importantly, cases such as *Lindley*, *Waltreus*, and *In re Lessard*, 62 Cal.2d 497, 399 P.2d 39 (1965) (search and seizure questions not cognizable on state habeas corpus), precluding habeas review of entire categories of claims, are not compatible with the Ninth Circuit's notion that original habeas jurisdiction is mandatory in California courts.

Five decisions, *Swain*, *Waltreus*, *Miller*, *Dexter*, and *Lindley*, alone or in combination, were the *only* cases cited in 296 of 348 California Supreme Court habeas denials accompanied by citations of authority in 1989. In other words, at least 85 percent of such denials were based on decisions which showed clearly that the state supreme court did not invoke a procedural default. The failure of

respondent's premise, that "39% of the time the Court . . . den[ied] relief for reasons of procedural default," is fatal to his conclusion that in the remaining habeas cases the California Supreme Court "wished to afford its citizens full review of federal constitutional claims in federal court, . . . by issuing an unadorned denial." (Resp. Br. at 6, 8.)

The California Supreme Court apparently is aware of *Harris* v. *Reed*. On May 31, 1990, our state high court entered the following order in *In re Theodore Frank on Habeas Corpus*, S013949:

> "None of petitioner's claims has merit or states a prima facie case for relief. Additionally, the claims described in paragraphs X through XVI are barred for procedural default as being untimely (In re Stankewitz (1985) 40 Cal.3d 391, 397 fn. 10, and noncognizable in habeas corpus (In re Terry (1971) 4 Cal.3d 911, 927; In re Dixon (1953) 41 Cal.2d 756, 759.) Mosk, J. and Broussard, J., are of the opinion the petition should be denied solely for failure to state a prima facie case for relief." California Official Reports, Advance Sheets, No. 18, Minutes, p.17 (1990).

The majority's explicit claim of "procedural default" appears to be directed towards the federal courts. However, this order is not proof that the state court "easily can write that 'relief is denied for reasons of procedural default,'" *Harris* v. *Reed*, *supra*, 489 U.S. at 265 n.12, or that the California Supreme Court is often inclined to do so. Rather, the order illustrates several difficulties arising from state habeas petitions: numerous claims; various grounds for rejecting a single claim; various

grounds for rejecting different claims; disagreement among the justices as to the proper grounds for denial. Not apparent from the face of the order, but present in the case, is the matter of successive petitions. See *People* v. *Frank*, 51 Cal.3d 718, 723, 274 Cal.Rptr. 372 (1990).

There is nothing "*pro forma*" about this order or about the deliberative process that produced it. Cf. *Harris* v. *Reed*, *supra*, 489 U.S. at 265 n.12. The California Supreme Court provided a detailed explanation for its action because this is a death penalty case. As a capital case, *Frank* is within that court's exclusive, mandatory appellate jurisdiction. Cal. Const., art. VI, § 11. Our Supreme Court Policies Regarding Cases Arising from Judgments of Death direct appellate counsel to investigate available grounds for habeas corpus relief and to file a habeas petition within 90 days after the filing of the defendant's reply brief on the direct appeal. Our supreme court's policy of consolidating direct appeals and habeas corpus proceedings in capital cases is implemented by compensating counsel only for petitions filed in the California Supreme Court. See California Official Reports Advance Sheets, 48 Cal.3d 1045a-1045b (1989); 51 Cal.3d Rules 8 (1990).

In 1989, the California Supreme Court denied 898 habeas corpus petitions, but filed only 27 opinions in death penalty cases. The differences between these numbers, between the state high court's mandatory and discretionary jurisdiction, and between capital and noncapital cases, explain why the California Supreme Court treats capital habeas petitions differently and why it cannot do otherwise. (See Petr. Br. at 22-23.)

The dissenting opinion in *Harris* v. *Reed* warned that "[b]ecause an ambiguous state-court order will ensure access to a federal habeas forum, prisoners whose claims otherwise would be procedurally barred now have every incentive to burden state courts with a never-ending stream of petitions for post-conviction relief," at least until they are "rewarded with a suitably ambiguous rebuff, perhaps a one-line order . . . stating that relief is 'denied.'" 489 U.S. at 282 (Kennedy, J., diss.); but cf. *id.* at 275 n.1. Dictum in footnote 12 of the majority opinion, *id.* at 265 n.12, relied on by the Ninth Circuit, made this prediction reality. *Nunnemaker* v. *Ylst*, *supra*, 904 F.2d at 476.

Respondent speculates that successive petitions will present no difficulty for the California Supreme Court because petitioners are asked to provide a complete procedural history of their case, including claims previously raised by habeas corpus petitions. (Resp. Br. at 30-31.) Not surprisingly, petitioners often neglect to doom their applications for relief by noting that their claims already have been rejected. Since in noncapital cases the state supreme court acts without the benefit of opposition, the disclosure requirement is virtually unenforceable.

"If this is in fact too burdensome on the state courts," respondent suggests, the state "can pass legislation amending [state] procedure." (Resp. Br. at 31.) Assuming that a statute could effectively remove or regulate original habeas jurisdiction conferred upon the California Supreme Court by our state constitution, Cal. Const., art. VI, § 10, the resulting withdrawal of the state court from post-conviction proceedings would disserve both state prisoners and the federal interest in state court

acceptance of responsibility for safeguarding federal rights. See *Rose* v. *Lundy*, 455 U.S. 509, 518 (1982).

Respondent's assertion that the Ninth Circuit's extension of the holding of *Harris* v. *Reed* imposes no new or undue burden on the California Supreme Court rests on a misunderstanding of the habeas corpus doctrine of both courts. There is no reason to suppose that the California Supreme Court regularly elects to waive state court procedural defaults; there is good reason to suppose that our state court lacks the resources to satisfy the Ninth Circuit's requirement that it act as though its discretionary jurisdiction to determine what cases to accept were mandatory jurisdiction to decide those cases. (Petr. Br. at 22-23.) The decision below forces the state court to choose between preserving the integrity of our procedural rules, disposing of its docket as it deems proper, or relinquishing its original habeas jurisdiction.[6/] Our notion of comity does not embrace a federal decision which, in practice, compels the state court to vindicate its procedural rules by waiving them.

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6. California's constitutional provision conferring original habeas corpus jurisdiction on the state supreme court is not unique. *See, e.g.,* Fla. Const., art. V, § 4; Idaho Const., art. V, § 9; Ill. Const., art. VI, § 4; Texas Const., art. V, § 5.

II.

A SILENT DENIAL OF A HABEAS CORPUS PETITION BY THE CALIFORNIA SUPREME COURT IS NOT A DECISION ON THE MERITS AND DOES NOT SUPERSEDE A WRITTEN OPINION WHICH FINDS A PROCEDURAL BAR.

Respondent next contends that a "silent" denial by the California Supreme Court of habeas corpus relief is a decision on the merits under state law. He argues: (1) "the California Supreme Court must examine the substantive issues and their merits which are presented in original habeas corpus writs before issuing even a minute order pro forma denial" (Resp. Br. at 12); (2) by contrast, a denial of review of a decision of an intermediate court of appeal does not require consideration of the merits of the appellant's claim; and (3) there is a meaningful distinction, for purposes of federal habeas corpus review of state convictions, between a summary denial of a petition which invokes a court's *original* jurisdiction and a silent refusal to exercise *appellate* jurisdiction. For reasons which follow, petitioner submits that respondent's position is untenable.

Petitioner begins by reiterating his essential position, which has two distinct dimensions. First, when a federal habeas court, in the exercise of its power under 28 U.S.C. § 2254, reviews a silent denial of habeas relief by a state court, it must examine that denial in the context of state

law.[7] Second, under California law, a denial by the California Supreme Court of habeas corpus relief is a discretionary rejection of the claim (or claims) but not necessarily a decision on the merits. Respondent earnestly disputes the second branch of this argument but in doing so, he implicitly accepts the first prong.

It seems to have been the theory of the Ninth Circuit that under *Harris* v. *Reed, supra*, 489 U.S. at 265 n. 12, a one-line *pro forma* denial by a state court of habeas corpus is conclusively presumed to be a rejection of the merits of the prisoner's claim unless the state court clearly and expressly relied upon a procedural default. *Nunnemaker* v. *Ylst*, 904 F.2d at 476. As petitioner reads

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7. Respondent asserts that "there has never been any suggestion that a writ of certiorari does not run to the California Supreme Court's minute order denial of an original writ of habeas corpus." (Resp. Br. at 14.) This observation completely misapprehends petitioner's point. Even if this Court should have *jurisdiction* under 28 U.S.C. § 1257 to review an order denying habeas corpus "by the highest court of a State in which a decision could be had," the *content* of the order must be determined by reference to state law. If the habeas denial reflects a discretionary decision not to grant the writ, because, for example, the petitioner did not raise the claim on his appeal ten years earlier, certiorari must be denied by this Court because the merits of the claim would not be before the Court. By parity of reasoning, on a petition for writ of habeas corpus under 28 U.S.C. § 2254, the federal habeas court would have jurisdiction to review the silent denial by the California Supreme Court, but would be required to resort to local law to determine the content of the order and, therefore, the significance of the denial.

the opinion of the Ninth Circuit, state law regarding the significance of a silent denial is irrelevant in the context of disposing of a subsequent petition for writ of federal habeas corpus. According to the Ninth Circuit, the Federal Habeas Corpus Act, as explicated in *Harris* v. *Reed, supra*, requires a federal habeas court to find that an unexplained denial of relief by a state court forgives any procedural defaults regardless of any state rule which may be to the contrary. U.S. Const., art. VI. If respondent agreed with that holding, he would have found it unnecessary to analyze state law. His attempt to establish that California law justifies the decision of the Ninth Circuit is, in effect, a repudiation of the *ratio decidendi* of that court. At the very least, both parties apparently have agreed that the judgment should be reversed to permit the Ninth Circuit to determine the significance under state law of a silent denial of habeas relief.

Turning to that issue, petitioner reiterates his position that a silent denial of habeas relief by the California Supreme Court does not forgive a procedural default which had been expressly invoked against the prisoner by an inferior court. In challenging this proposition, respondent argues that the supreme court must examine the merits of the issues presented in a petition for writ of habeas corpus before denying it. If the court does not cite a case which indicates a procedural basis for the denial, respondent concludes, the denial must have been on the merits. Petitioner readily agrees that the state supreme court carefully examines each petition for writ of habeas corpus, but disputes respondent's conclusion that

the basis for the denial is invariably ascertainable from the four corners of the court's order.

As petitioner explained in Argument I, many of the cases cited by the state supreme court in its orders of denial indicate a procedural defect *in the petition before it*. Thus, the petition may duplicate claims which had been rejected in earlier habeas petitions (*In re Miller*, 17 Cal.2d 734, 735, 112 P.2d 513 (1941]); it may make claims which were raised on direct review (*In re Waltreus*, 62 Cal.2d 218, 225, 397 P.2d 1001 [1965]); it may raise a claim with insufficient factual allegations (*In re Swain*, 34 Cal.2d 300, 304, 209 P.2d 793 [1949]); or it may raise claims which are generally not cognizable on state habeas corpus (*e.g.*, *In re Sterling*, 63 Cal.2d 486, 487, 407 P.2d 5 [1965]; *In re Lindley*, 29 Cal.2d 709, 723, 177 P.2d 918 [1947].) Respondent suggests that an order denying relief which does not cite such a case must reflect a rejection of the merits of the claim. The suggestion presumes that procedural defects which may be found in a habeas petition exhaust the universe of procedural defaults. In fact, as in this case, the default may have occurred at trial. None of the cases upon which respondent relies (Resp. Br. at 22-23) addresses such a procedural default. Even accepting respondent's position that a silent denial could be interpreted as forgiving a pleading defect, it would be impossible to determine whether it also forgave a default occurring at trial.

Furthermore, respondent's argument overlooks the fact that the state supreme court is composed of seven justices, each of whom may have a different reason for denying relief. For example, two may reject the claim on the merits; two may determine that the claim was not

stated with sufficient particularity and three may decide that the petitioner should have raised the issue on appeal. This division of reasons may be compounded by a petition which presents multiple claims for relief.

Petitioner cannot stress too strongly that the validation of respondent's view of California habeas corpus practice would undermine the state supreme court's ability to control its docket. Unless the court were willing to grant a blanket waiver of procedural defaults, it would be required to issue orders in each habeas corpus case explaining the basis for the denial of the petition. As a result, the court would soon lose control of its caseload.

Finally, respondent notes that a denial of review by the state supreme court of an intermediate appellate court is not a decision on the merits according to Rule 29 of the California Rules of Court. Because there is no comparable rule expressly permitting the state high court to deny habeas relief as a matter of discretion, it follows that a silent denial must be on the merits. Respondent assumes that the rules of court furnish the exclusive basis for interpreting the significance of silent denials by the state supreme court. Petitioner believes that the opinions of that court provide better illumination.

Thus, the state high court has indicated that the writ may be employed as a substitute for an appeal when the question of law is "'so important as to justify an extraordinary remedy. . . .'" *In re Jackson*, 61 Cal.2d 500, 505, 393 P.2d 420 (1964). In addition, the court will issue an order to show cause to resolve a conflict in cases decided by the intermediate courts of appeal. *In re Joyner*, 48 Cal.3d 487, 491, 769 P.2d 967 (1989). These exceptions are identical to those specified in Rule 29(1), which

defines the discretion of the supreme court in the review of court of appeal decisions. This congruence suggests the conclusion that the state high court views its habeas jurisdiction, like its power on direct review, as a discretionary tool to shape the state's jurisprudence. Certainly its denials are not intended as conclusions on the merits.[8/]

A silent denial of habeas relief by the state supreme court reflects nothing more than a discretionary decision not to disturb a presumptively valid judgment. It does not purport to reflect the reasons why the court has reached that decision. As explained above, each justice of the California Supreme Court may have his or her own reasons. Nor does the failure to give reasons for a denial in any way compromise the existence of habeas corpus as a meaningful remedy in California. State law requires superior courts, in which the prisoner should file his

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8. In addition, respondent has overlooked California Penal Code section 1506, which allows the prisoner to petition for review in the supreme court "in all criminal cases where an application for writ of habeas corpus has been heard and *determined* in a court of appeal. . . ." (Emphasis added.) By contrast, summary denials by the court of appeal are not appealable; the prisoner must petition for habeas corpus to the supreme court. *In re Crow*, 4 Cal.3d 613, 621 n. 8, 483 P.2d 1206 (1971). Thus, the legislature has drawn a distinction between written opinions, which determine the merits of a petition and are appealable, and summary denials, which reflect no decision on the merits and hence are not appealable. The state high court's practice merely reflects this legislatively-endorsed distinction.

petition initially (*In re Hillery*, 202 Cal.App.2d 293, 20 Cal.Rptr. 759 [1962]), to provide "a brief recital of the reasons for the denial" in its order. Cal. Rules of Court, rule 260(e). Given the prisoner's entitlement to an explanation from the superior court, the supreme court should not be obliged to reiterate or supplement that explanation.[9/]

In respondent's case, he had more than a brief recital of reasons. He had a full and correct explanation on direct appeal of the basis for the rejection of his claim under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Nevertheless, he contends (Resp. Br., Argu. III) that the denial of habeas relief was not necessarily an approval of the reason given by the court of appeal, which had found a default at trial. He explains that state law provides several exceptions to procedural bars on state habeas corpus (Resp. Br. at 24) and that the failure by the supreme court to cite any cases which announce such a bar suggests the possibility that the denial was on the merits. Specifically, it is possible that the state high court waived the prohibition against relitigating on habeas

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9. Petitioner recognizes that the California Supreme Court denies a significant percentage of habeas corpus petitions with a citation to a case or cases which suggest procedural defect. (Resp. Br. at 8.) The vast majority of these petitions are prepared by prisoners without the aid of counsel. The citations are intended to advise them of the procedural defects which appear on the face of their petitions. The failure to provide free legal advice in other summary denials is *not* intended to waive procedural defaults which may have occurred at trial or on appeal.

waived the prohibition against relitigating on habeas corpus claims which had been raised an appeal (*In re Waltreus, supra*, 62 Cal.2d 218, 397 P.2d 1001) because respondent relied on cases which had not been decided at the time of his appeal.

The fallacy of this theory lies in the misapprehension of the function of the exceptions upon which respondent relies. If in fact the supreme court is relying upon an exception to a procedural bar, it will *issue* an order to show cause and then proceed to decide the merits of the claim in a *written opinion*. *E.g.*, *In re Coughlin*, 16 Cal.3d 52, 545 P.2d 249 (1976); *In re Bevill*, 68 Cal.2d 854, 442 P.2d 679 (1968). Respondent cites no authority which declares that silent denial may be construed as a waiver of a default which previously had been invoked against the prisoner. Petitioner reiterates the overarching principle of California law, based upon reason and justice, which explains the rejection by the California courts of respondent's *Miranda* claim: a written opinion providing reasons for the denial of a constitutional claim is neither altered nor supplanted by subsequent summary denials of habeas relief by an appellate court which has exercised its discretion not to issue an order to show cause. In this case, the state court of appeal expressly based its rejection of respondent's *Miranda* claim upon his failure to object at trial. His subsequent efforts to litigate the merits of that claim were met with a uniform rejection in the form of one-line denials by the state court of appeal and supreme court. If respondent and the Ninth Circuit want to know the reason for that rejection, they have only to inspect the opinion written by the state court of appeal almost 15 years ago.

III.

HARRIS V. *REED* DID NOT DECLARE THAT A SILENT DENIAL OF STATE HABEAS CORPUS RELIEF WAS CONCLUSIVELY PRESUMED TO BE ON THE MERITS.

Finally, respondent asserts that the "plain statement" rule of *Harris* v. *Reed, supra*, plainly applies to minute order denials of state habeas corpus relief (489 U.S. at 265 n.12), and that any rule to the contrary would have the undesirable consequence of requiring federal courts to examine state law and the prisoner's state court records to determine whether state courts in fact applied an available procedural bar. Petitioner responds to these concerns in turn.

This Court declared in *Harris* that "a state court that wishes to rely on a procedural bar rule in one-line *pro forma* denial easily can write that 'relief is denied for reasons of procedural default.'" *Id.* at 265 n. 12. This footnote dictum necessarily presupposes that a one-line denial is a resolution of the merits under state law. Nothing in *Harris* suggests that this Court intended to create a conclusive presumption that a silent denial was a decision on the merits in derogation of state law which may hold to the contrary. Consequently, the *Harris* dictum requires initial evaluation of state law to determine whether a silent denial is a resolution of the merits of the claim. If so, a "plain statement" rule is necessary to determine state reliance upon a procedural bar. But

where, as here, habeas relief is discretionary under state law, and an earlier written opinion has resolved the constitutional claim and identified the basis therefor, the "plain statement" rule is clearly inapplicable.

Respondent also contends that petitioner's position, if accepted, would require federal habeas courts "to undertake an extensive analysis of state law to determine whether a procedural bar was potentially applicable to the particular case." *Harris* v. *Reed, supra*, at 265. This assertion does not withstand scrutiny, for inquiries into state law are inevitable on federal habeas review.

Thus, the federal habeas court must determine whether the prisoner has exhausted state remedies or whether such a remedy is still available, a question of state law. *Castille* v. *Peoples*, 489 U.S. 346 (1989). Exhaustion of state remedies will be found if there is a state procedural bar to the litigation of the claim, another question of state law. *Teague* v. *Lane*, 489 U.S. 288, 297 (1989). If a state procedural bar exists, the federal habeas court must determine whether state courts routinely apply it, an inquiry which necessarily entails on careful analysis of state law. *Dugger* v. *Adams*, 489 U.S. 401, 410-411 n. 6 (1989). In addition, the federal habeas court must decide whether the procedural rule furthers legitimate state interests. *James* v. *Kentucky*, 466 U.S. 341, 344-349 (1984). In light of this considerable body of state law which federal courts are expected to know and apply, an evaluation of a silent denial by the state supreme court of habeas relief in the context of the prior procedural history -- assumed by respondent to be routinely

available[10/] (Resp. Br. at 30 n.16) -- should not be unduly burdensome. See *Brown* v. *Allen*, 344 U.S. 443, 458 (1953).

In stark contrast to this insignificant incremental burden are the consequences of respondent's position, if adopted. Should this Court accept the argument that silent denials are conclusively presumed to be on the merits, the California Supreme Court no longer would have control of its own docket. The court would be required to prepare written orders, in which four or more justices concurred, in almost one thousand additional cases each year. The only alternative would be acquiescence in a conclusive presumption which compromises state law. This Court surely did not intend to undermine the vital interests of federalism and comity by requiring such a drastic alteration of state habeas corpus review. Respondent's view of *Harris* and its reach must be rejected.

CONCLUSION

It is too much to ask federal courts to read the minds of state courts, which need only speak clearly. It is not to much to ask that federal courts read state laws before declaring that state courts have silently refused to enforce

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10. In fact, many petitions filed by prisoners *in forma pauperis* will make misrepresentations about the procedural history of their trial, conviction, and use of appellate remedies. A summary denial by the state supreme court of habeas relief cannot be interpreted as a waiver of a procedural bar of which the state court might not have been aware.

their procedural rules. That difference between *Harris* v. *Reed* and this case prompted California to urge application of the "plain statement" rule, as amicus curiae in *Harris*. California has not changed its view; by overextending *Harris*, the Ninth Circuit has changed the stakes. *Harris* required only plain language; the decision below requires that the California Supreme Court sacrifice control of its docket or the integrity of procedural rules governing state trials and appeals. Beyond affronting the principle of comity, such results are unnecessary since assessment of state laws by federal courts is an integral part of the procedural default rule, and constitutes a burden federal courts have proved able to bear. *Brown* v. *Allen*, 344 U.S. 443, 458 (1953).

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(3)

NO. 90-68

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1990

EDDIE S. YLST
Petitioner

v.

OWN DUANE NUNNEMAKER
Respondent

On Writ Of Certiorari
To the Ninth Circuit Court of Appeals

BRIEF OF THE OFFICE OF WAYNE COUNTY PROSECUTING ATTORNEY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF THE QUESTION

UNDER HARRIS V REED MUST THE FEDERAL COURTS ON HABEAS CORPUS REVIEW, IN LOOKING FOR THE "PLAIN STATEMENT" OF PROCEDURAL DEFAULT BY THE STATE COURT SYSTEM, LOOK TO THE STATE COURT JUDGMENT WHICH ADDRESSED THE CLAIMS OF THE DEFENDANT AND HELD THAT THERE WAS A PROCEDURAL DEFAULT, RATHER THAN SIMPLY TO ORDERS OF HIGHER STATE COURTS DENYING REVIEW OR RELIEF?

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STATEMENT OF THE CASE

Amicus adopts the statement of the case of the Petitioner.

INTEREST OF THE AMICUS

Amicus is the Office of the Wayne County Prosecuting Attorney. That office prosecutes all criminal cases in the County of Wayne in Michigan, the largest county in the State, and one of the largest in the country. The office also litigates federal habeas corpus matters in the federal courts, as well as Motions for Relief from Judgment in the state courts, where questions with regard to procedural bar are necessary to the question of relief; further litigation in the appellate courts results in "form" orders of denial if leave to appeal is denied. Amicus was recently "scolded" by a panel of the Sixth

Circuit for taking a position similar to that now taken by the Petitioner (though relief was denied the petitioner). Amicus thus has a great interest in the outcome of this litigation, with respect of the course of future litigation in the state and federal courts on procedural bars.

ARGUMENT

UNDER HARRIS V REED THE FEDERAL COURTS ON HABEAS CORPUS REVIEW MUST, IN LOOKING FOR THE "PLAIN STATEMENT" OF PROCEDURAL DEFAULT BY THE STATE COURT SYSTEM, LOOK TO THE STATE COURT JUDGMENT WHICH ADDRESSED THE CLAIMS OF THE DEFENDANT AND HELD THAT THERE WAS A PROCEDURAL DEFAULT, RATHER THAN SIMPLY TO ORDERS OF HIGHER STATE COURTS DENYING REVIEW OR RELIEF.

Respondent in this case first raised federal constitutional challenges to certain testimony on his direct appeal to the California Court of Appeal. That court declined to address the merits of the claims, holding that the failure to interpose a contemporaneous objection at trial was a procedural bar to review. Respondent sought discretionary review in the California Supreme Court, which, without comment or case citation, declined to hear the case. Further review was sought by way of state petitions for habeas

corpus, which were denied. Ultimately a petition for habeas corpus was filed in the federal district court raising the issue regarding which the California Court of Appeal had found a procedural default, and the district court declined to consider the issue because of the state procedural default.

The Ninth Circuit disagreed with the district court with regard to the procedural default. Relying on Harris v Reed, 103 L Ed 2d 308 (1989) the court held that given the statement in Harris that "a federal claimant's (state) procedural default precludes federal habeas review...only if the last state court rendering a judgment in the case rests its judgment on the procedural default" (emphasis added by the court, 896 F 2d at 1203), and given that the California Supreme Court had not rested its decision

not to review the case on Respondent's state habeas petition explicitly on a procedural default, the procedural bar was inapplicable on habeas review. The court appeared to rely heavily on the fact that after his request for review on direct appeal was denied, Respondent had raised the same issue in the California courts on a petition for writ of habeas corpus, those petitions being denied without comment by the California Supreme Court. The court considered the denial of relief on collateral attack (habeas review) in the state court to be a "judgment," though admitting that the initial denial of review by the California Supreme Court on direct appeal might not have been a judgment, drawing a distinction because California law allows the filing of a habeas petition in the California Supreme Court as an original matter, not as a matter of review of the denial of such a petition by the

California Court of Appeal (at least this was the view of California law of the court). Amicus submits that the Ninth Circuit view of Harris should be rejected.

In many jurisdictions, review after the direct appeal is over begins in the trial court, with limited grounds for relief available. For example, in Michigan after the direct appeal is over the defendant may only seek relief by filing a "Motion for Relief From Judgment" in the trial court. To obtain relief on grounds which could have been raised previously, the defendant must show cause and prejudice for his procedural default. A failure to do so results in denial of the motion. Appellate review is by leave, and denial of review would be by form order ("for lack of merit in the grounds presented"). See MCR 6.502; 6.508(D); 6.509. Thus, the apparent California procedure allowing a petition

for collateral review in the appellate court would not occur, and the holding of the Ninth Circuit that the denial of the petition for habeas corpus by the California Supreme Court was a "judgment" would be inapplicable to denials of requests for review of lower court rulings. Nonetheless, amicus submits that the Ninth Circuit too narrowly viewed this Court's holding in Harris; alternatively, if not, this Court should make clear that the federal courts on habeas should look to the last state court discussing the Petitioner's claims in substance, and finding procedural default, in determining the procedural default/plain statement question under Harris.

That the view of Harris taken by the Ninth Circuit has not been limited to situations where state law allows collateral attacks in the appellate courts,

rather than only petitions for review of denial of collateral attacks in the trial court, is demonstrated by Johnson v Burke, 903 F 2d 1056 (CA 6, 1990). After his direct appeal had been taken and lost, the petitioner made four unsuccessful attempts at postconviction relief in the state courts. On his final attempt his "application for leave to file a delayed motion for a new trial" (prior to the creation of the Motion for Relief From Judgment rule) was denied. The trial court relied on principles of finality to decline to reach the merits of the motion, instead denying the defendant's request for leave to file the delayed motion for new trial. Discretionary leave was sought from the Michigan Court of Appeals, which denied it in a form order ("for lack of merit in the grounds presented"), and the Michigan Supreme Court, which also denied in a form

order (for failure to persuade that the questions require review).

In the Sixth Circuit (which affirmed the denial of relief to the petitioner) the argument was made by the State that under Harris the "last state court rendering a judgment" was the trial court, the appellate courts simply denying review on discretionary applications. It was also pointed out that the language in the form order "denied for lack of merit" as a matter of logic referred to the underlying decision being appealed; that is, the order was a finding that there was no merit in the claim that there was error in the trial court's refusal to hear the merits of the claim. The court was not itself addressing those underlying merits in denying discretionary review from a decision refusing to hear the merits.

The Sixth Circuit found these arguments that the Michigan Court of Appeals' and Michigan Supreme Court's orders were orders "denying review" of a procedural decision to be "wholly without merit," and in effect held that the plain statement had to come from the appellate courts when denying discretionary review of a lower court procedural holding.

On the other hand, the eleventh circuit has taken a more realistic approach. In Harmon v Barton, 894 F.2d 1268 (CA 11, 1990), the petitioner raised an issue which had not been raised in his direct appeal or in his first postconviction motion. Rather, the issue, which was ultimately presented by way of a federal habeas corpus petition, was first raised in a second postconviction motion in the trial court. As to this latter motion,

the trial court concluded, consistent with state law, that the petitioner was procedurally barred from pursuing his claim because he neither raised the issue on his direct appeal nor in his first postconviction motion. The state appellate court then issued a per curiam affirmance of the trial court's ruling. When the matter found its way to the federal courts, the question was whether, in light of this Court's decision in Harris, the per curiam affirmance of the trial court's ruling was a clear and express statement of reliance on a state procedural bar. The petitioner argued that a state per curiam affirmance without a written opinion should be construed as a decision on the merits because the appellate court, as the last state court rendering a judgment, did not clearly and expressly state that its judgment rested on a state procedural bar.

The state countered that affirmance without comment of a decision explicitly based on a procedural bar was unambiguous and was factually distinguishable from Harris.

The eleventh circuit prefaced its analysis as follows:

> It is, of course, incumbent upon this court to ascertain for itself whether the state court clearly and expressly rejected petitioner's claim on the basis of an independent and adequate state procedural ground. Such a determination necessarily involves an analysis of state law concerning the effect of a per curiam affirmance of a trial court decision to summarily deny post-conviction relief which expressly relies on the ground of procedural default for its result. 894 F.2d at 1272, citations omitted.

The Court then noted that under Florida law, a decision by an unwritten per curiam affirmance was not a precedent for a principle of law and should not be relied

upon for anything other than res judicata. The Court then stated and held as follows:

> The "plain statement" rule, it should be emphasized, applies only when an ambiguity exists in the state court disposition. A per curiam affirmance decision does not create an ambiguity to an otherwise unambiguous situation, just as it does not clarify ambiguity that exists based on the decision below." Rease v. State, No. 88-3754 (M.D. Fla. Aug. 25, 1989). Stated differently, the plain statement rule should not be applied to create an ambiguity where one did not exist simply because the appellate court, by its per curiam affirmance, elected not to restate an unambiguous lower court ruling. We conclude that the court's per curiam ruling explicitly based on procedural default is a clear and express statement of its reliance on an independent and adequate state ground which bars consideration by the federal courts." 894 F.2d at 1273 (emphasis added).

This common-sense holding is inconsistent with the view taken by the Sixth Circuit in Johnson v Burke, and with the Ninth Circuit

in this case. The denial of discretionary review is not precedent, and has no value other than for res judicata; the denial of the habeas petition by the California Supreme Court in this case is of similar effect. The state court to consider the case and render a determinative decision found a procedural bar, and found it unambiguously. This ruling should be followed. State courts should not be required to revamp their systems for denial of review so as to insure that it is clear that denials of review or relief without comment are not decisions on the merits, and do not sub silencio overturn clear decisions by lower courts which have found a procedural bar to relief. As well-put by the eleventh circuit, "the plain statement rule should not be applied to create an ambiguity where one did not exist" simply because in further denials of relief the

busy state courts elect not to restate an unambiguous lower court ruling.

CONCLUSION

Wherefore, amicus respectfully requests that the judgment of the Ninth Circuit be reversed.

Respectfully submitted,

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Supreme Court, U.S.
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No. 90-68

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

EDDIE S. YLST, Warden,

Petitioner,

vs.

OWEN DUANE NUNNEMAKER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Under the rule in *Harris* v. *Reed*, 489 U. S. 255 (1989), does a state high court's summary denial of a habeas corpus petition forgive a procedural default claimed by an intermediate appellate court on direct review?

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No. 90-68

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

EDDIE S. YLST, Warden,

Petitioner,

vs.

OWEN DUANE NUNNEMAKER,

Respondent.

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest.

CJLF seeks to bring the constitutional protection of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

1. CJLF has received written consent from both parties to file the brief.

The present case involves a decision by the Ninth Circuit Court of Appeals, which, if left standing, would hamstring procedural default. It would effectively eliminate an important tool for states to enforce their procedural rules in criminal cases. It would result in the relitigation on federal habeas corpus of cases already correctly decided by the state courts. Such relitigation is thus contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

On May 31, 1975, defendant, armed with an automatic weapon, forcibly entered the home of his estranged wife. After a struggle with his wife, defendant fired one shot from approximately three feet away, mortally wounding her. Petition for Certiorari ("Pet.") 8-9. Defendant prevented witnesses from summoning help, cutting the telephone cord to keep anyone from calling for an ambulance. *Id.*, at 9. The murder was committed in the presence of at least two of the couple's foster children. See *id.*, at 9.

On January 30, 1976, a jury found defendant guilty of murder in the first degree and found that he was armed with and used a deadly weapon in the commission of the offense. *Id.*, at 6. On June 30, 1978, the California Court of Appeal for the First Appellate District, in an unpublished opinion, modified and affirmed the conviction. *Id.*, at 7 and Appendix C. The court of appeal, in reaching its decision, found that defendant was procedurally barred from raising a *Miranda* issue for the first time on appeal. *Id.*, at 12-13. On September 27, 1978, the California Supreme Court denied defendant's petition for hearing. *Id.*, at 7.

During 1985 and 1986 defendant filed numerous petitions for habeas corpus in the Sonoma County Superior Court, the Court of Appeal, and the California Supreme Court. These petitions were summarily denied. *Ibid.*

On November 12, 1987, defendant filed a habeas corpus petition in the federal district court. The petition was denied on December 9, 1988. *Id.*, at 8. The Ninth Circuit Court of Appeals reversed part of the judgment of the district court, finding that defendant's *Miranda* claim was not procedurally barred in spite of the express finding of procedural default by the California Court of Appeal. *Nunnemaker* v. *Ylst*, 896 F. 2d 1200, 1204 (9th Cir. 1990).

SUMMARY OF ARGUMENT

Procedural default is derived from the principles of comity and finality. These principles should not be subverted by a blind application of *Harris* v. *Reed*, 489 U. S. 255 (1989).

Requiring the California Supreme Court to make a finding of procedural default whenever it dismisses a habeas corpus petition places too great a burden on the resources of California's high court. The California Supreme Court has a very large docket and must be able to summarily deny habeas petitions without perusing them for procedural default. If the court cannot apply the Ninth Circuit's holding, then California will not be able to enforce its procedural rules in criminal cases.

The summary denial of a habeas petition by the California Supreme Court is only a decision not to exercise discretionary jurisdiction over a prisoner's claim. It is analogous to this Court's summary denial of original habeas petitions and writs of certiorari. As the California Supreme Court's summary denial of a habeas petition means nothing more than that the court decided not to hear a particular case, the denial is not a judgment under *Harris*.

Even if the decision of the California Supreme Court was more than a decision not to take jurisdiction over the case, it still is not a judgment under *Harris*. *Harris*, like *Michigan* v. *Long*, 463 U. S. 1032 (1983), was concerned with ambiguous findings of independent state grounds. As there was a clear, uncontradicted finding of procedural default by the California

Court of Appeal in the present case, there is no ambiguity for *Harris* to deal with. Thus *Harris* should not be used to invalidate the findings of procedural default by the California Court of Appeal.

ARGUMENT

I. The Ninth Circuit's decision subverts procedural default and the principles it protects.

The Ninth Circuit held that the State of California could not raise a procedural default to bar defendant's *Miranda* claim because the California Supreme Court did not "expressly state its reliance on Nunnemaker's procedural default when denying his final habeas petition." *Nunnemaker* v. *Ylst*, 896 F. 2d 1200, 1204 (9th Cir. 1990). This threatens the constitutional balance between state and federal courts under the federal structure. It ignores an explicit finding of procedural default by the California Court of Appeal, Pet. 12, and places an intolerable burden of compliance on the California Supreme Court.[2]

> "[T]he present scope of habeas corpus tends to undermine the values inherent in our federal system of government. To the extent that every state criminal judgment is to be subject indefinitely to broad and repetitive federal oversight, we render the actions of state courts a serious disrespect in derogation of the constitutional balance between the two systems. The present expansive scope of federal habeas review has prompted no small friction between state and federal judiciaries." *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 263 (1973) footnote omitted (Powell, J., concurring).

Justice Powell's observation continues to ring true 17 years later. This case is another example of the denigration of state

2. See Part I. B., *infra*, at 7-14.

courts by some of the lower federal courts in habeas corpus actions.

A. Interests preserved.

Procedural default protects many interests. The common theme of these interests is protecting state judiciaries from undue interference by federal courts. Federalism is one of the most important interests protected by the Constitution.

> "[I]t would surely be shallow not to recognize that the structure of our political system accounts no less [than the Bill of Rights and the Fourteenth Amendment] for the free society we have. Indeed, it was upon the structure of government that the founders primarily focused in writing the Constitution. Out of bitter experience they were suspicious of every form of all-powerful central authority and they sought to assure that such a government would never exist in this country by structuring the federal establishment so as to diffuse power between the executive, legislative, and judicial branches. The diffusion of power between federal and state authority serves the same ends and takes on added significance as the size of the federal bureaucracy continues to grow." Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 A. B. A. J. 943-944 (1963).

Without procedural default a state would be unable to enforce its own procedural rules. If a criminal defendant can raise a procedurally defaulted claim in federal court, then the state can impose no meaningful sanction to require defendants to comply with its rules of procedure. Therefore, federal courts must respect the procedural default findings of state courts to maintain an orderly administration of justice. See *Reed* v. *Ross*, 468 U. S. 1, 10-11 (1984); *Engle* v. *Isaac*, 456 U. S. 107, 129 (1982).

Another key interest served by procedural default is comity. This Court has long recognized that state courts deserve the opportunity to finish litigating a defendant's claims before

having their judgments reviewed by federal courts in habeas corpus. See *Ex parte Royall*, 117 U. S. 241, 252 (1886). Allowing procedurally defaulted claims to be heard in federal court would undermine those interests.

> "In that situation, the trial court has had no opportunity to correct the defect and avoid problematic retrials. The defendant's counsel, for whatever reasons, has detracted from the trial's significance by neglecting to raise a claim in that forum. The state appellate courts have not had a chance to mend their own fences and avoid federal intrusion." *Engle*, *supra*, 456 U. S., at 128-129.

Procedural default also protects the finality of state judgments. Successful enforcement of state procedural rules will put more focus on the trial and the initial appeal. By being forced to raise all issues at these early stages, a criminal defendant can obtain an acquittal or early reversal, or if he is unsuccessful and is convicted, he will have fewer claims to assert in his federal habeas petition. See *Wainwright* v. *Sykes*, 433 U. S. 72, 88-89 (1977); *Reed*, *supra*, 468 U. S., at 10-11. Preserving the finality of state judgments is important because a later review of a defendant's claims can bring serious problems. "[E]vidence may no longer be available to evaluate the defendant's constitutional claim if it is brought to federal court long after his trial; and it may be too late to retry defendant effectively if he prevails in his collateral challenge." *Reed*, *supra*, 468 U. S., at 11. The problem of retrying defendants after successful collateral attack is one of the greatest costs associated with the Great Writ. *Engle*, *supra*, 456 U. S., at 127-128.

The procedural default rule, like all other limits on a federal court's habeas corpus jurisdiction, is designed to preserve federalism. Preserving finality, giving state courts the first opportunity to litigate claims, and helping states enforce their procedural rules all help preserve the power of state courts against the intrusions of habeas corpus. Maintaining the integrity of the state judiciary is an essential component of habeas corpus. See *Reed*, *supra*, 468 U. S., at 10. When every

decision a state court makes is subject to perpetual second-guessing by federal courts, it will be very easy for state judges to become alienated from their duties.

> " 'I could imagine nothing more subversive of a judge's sense of responsibility of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else.' " *Schneckloth*, *supra*, 412 U. S., at 264-265 (Powell, J., concurring) (quoting Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 451 (1963).

State courts are not the vassals of the federal judiciary under habeas corpus. They are independent bodies which do the job of providing the bulk of our nation's criminal adjudication. See *Michigan* v. *Long*, 463 U. S. 1032, 1042, n. 8 (1983). The founders understood the importance of state courts when they gave the federal judiciary limited, enumerated jurisdiction. See U. S. Const. art. III, § 2; *The Federalist* No. 82 (A. Hamilton). The procedural default rule must be interpreted with the interests of federalism in mind. Allowing procedural default to derogate the powers of state courts runs the risk of federal tyranny that so worried Justice Harlan. See Harlan, *supra*, 49 A. B. A. J. at 943-944.

B. Interests destroyed.

The Ninth Circuit did not attempt to preserve state interests in the present case. "[I]t has long been recognized as the very essence of federalism that the states should have the widest latitude in the administration of their own systems of criminal justice." *Hoag* v. *New Jersey*, 356 U. S. 464, 468 (1958). The ruling below shows no appreciation for the needs of state court systems or the strain it would place on their resources. If upheld, it would be nearly impossible for California to enforce its procedural rules in criminal cases. This derogation of a state's criminal justice system is the antithesis of what the procedural default rule is intended to accomplish

and provides compelling justification for reversal in this case.

The California Supreme Court is a very busy place. It is the highest court of our largest state, encompassing over 28,000,000 people in its jurisdiction. U. S. Bureau of the Census, *Statistical Abstract of the United States 1990* (110th ed.) at 20. To deal with this many people, California has developed a large and sophisticated judiciary. California has 218 courts with 1,555 authorized judgeships. 2 Judicial Council of California, *1990 Annual Report*, at 19 (1990). During the fiscal year 1988-89 over 11 million cases were filed, excluding parking violations. *Ibid.* This system costs California taxpayers $1.3 billion dollars to maintain, not including capital outlays. *Ibid.* All of this is overseen by the California Supreme Court.

The duties of the California Supreme Court in overseeing this system are substantial. The Supreme Court, courts of appeal, and superior courts "have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition." Cal. Const. art. VI, § 10. California's high court also has exclusive appellate jurisdiction whenever a death penalty has been pronounced. *Id.*, § 11. Mandatory appellate jurisdiction also extends to decisions of the Public Utilities Commission, Cal. Pub. Util. Code §§ 1756, 1759. The state high court oversees all bar discipline matters. See Cal. Bus. & Prof. Code §§ 6082, 6084. Finally, the Supreme Court has the jurisdiction to review the decisions of the intermediate courts of appeal. Cal. Const. art. VI, § 12 subd. (b).

The California Supreme Court's docket is commensurate with its responsibilities. In the fiscal year 1988-89, 4,251 cases were filed before it, and the court disposed of 4,488 cases. See 2 Judicial Council, *supra*, at 24. By comparison, this Court, at the conclusion of the 1989 October term, docketed 5,746 cases, 59 U. S. L. W. 3064 (July 7, 1990), and disposed of 4,908 of them. *The Supreme Court, 1989 Term*, 104 Harv. L. Rev. 40, 363 (1990).

In addition to having a docket almost the size of this Court's, the California Supreme Court has greater mandatory

jurisdiction requirements than this Court. This Court is required to take relatively few cases. It has original and exclusive jurisdiction only over "all controversies between two or more states." Even that jurisdiction is not fully mandatory in practice. See *Maryland* v. *Louisiana*, 451 U. S. 725, 761 (1981) (Rehnquist, J., dissenting). In the October 1989 term, only 14 of these cases were on this Court's docket, 13 of which were hold-overs from the previous term. 59 U. S. L. W. 3064. This Court's mandatory appellate jurisdiction has been limited by Congress to review of decisions of the rarely convened special three-judge district court tribunals. See 28 U. S. C. § 1253, P. L. 100-352, 102 Stat. 662 (1988); see also 28 U. S. C. § 2284 (three-judge court for apportionment cases).

The mandatory jurisdiction of the California Supreme Court, however, includes all appeals from death penalty judgments. Cal. Const. art. VI, § 11. These cases place great pressure on the Court's resources. In the fiscal year 1988-89, it took 37 new death penalty appeals and disposed of 46 death penalty cases from its docket. 2 Judicial Council, *supra*, at 24. These cases are the most complicated cases an appellate court can receive, raising many issues under the complex jurisprudence of capital punishment. As much as 20 percent of the court's time is devoted to these cases. Kaufman, *Crisis in the Courts*, California Lawyer 28, 30 (August 1990).

Viewed in context of the demands placed on the California Supreme Court, the problems with the Ninth Circuit's opinion below reveal themselves. In fiscal year 1988-89, 1,005 original habeas corpus petitions were disposed of by the California Supreme Court. 2 Judicial Council, *supra*, at 24. The overwhelming majority of these petitions were summarily denied. The California Supreme Court issued only 120 opinions in 1988-89. *Id.*, at 27. Furthermore, only 97 extraordinary writs of all sorts, including certiorari, mandamus, and habeas corpus were issued in 1988-89 out of a total of 1,210 applications for such writs. *Ibid.* Thus, by any measure, the bulk of habeas petitions were summarily denied by the California Supreme Court. Given the volume of habeas petitions dismissed, there is little doubt that the dismissals do not go to the merits, but rather are decisions that the issues raised do not merit

Supreme Court review and are properly entrusted to the lower courts.[3] Cf. *Brown* v. *Allen*, 344 U. S. 443, 491 (1953).

The Ninth Circuit's opinion would require the California Supreme Court, in order to preserve procedural default, to deny a habeas petition with a one line order denying relief for procedural default. *Nunnemaker*, *supra*, 896 F. 2d, at 1204. During 1988-89 this would have required the California Supreme Court to scour each of the 1,005 habeas petitions it disposed of to decide which of the many issues raised should be indicated as denied on procedural default grounds. After looking for procedural default, the justices of the California Supreme Court would have to agree whether procedural default existed for each petition. Getting the members of a high court to agree on the reasons for a summary denial will be a daunting task. See *Darr* v. *Burford*, 339 U. S. 200, 227 (1950) (Frankfurter, J., dissenting).[4]

The problem of finding procedural default is compounded by the fact that most habeas petitions will contain a mix of claims which are and are not procedurally defaulted. One example is defendant's federal habeas petition in the present case. The District Court found that defendant's Fifth and Sixth Amendment claims were procedurally barred, but it addressed the merits of his ineffective assistance of counsel claim. *Nunnemaker*, *supra*, 896 F. 2d, at 1202. These claims were also made to the California Supreme Court in defendant's second habeas petition. *Ibid*. As it is likely that a procedurally defaulted claim will bring up a charge of ineffective assistance of counsel to excuse the default,[5] many petitions will contain mixed claims.

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3. See *infra* at 11.

4. For a more extensive analysis of the problem of getting a court to agree on a reason for summary denial, see part II., *infra*, at 19-20.

5. See, *e.g.*, Petition for Certiorari in *Coleman* v. *Thompson*, No. 89-7662, question 3.

A conscientious court, when making a statement of procedural default, would indicate only those claims that were procedurally defaulted. The statement that the Ninth Circuit would have the California Supreme Court make ("relief is denied for reasons of a procedural default") would be inaccurate. *Id*., at 1204 (quoting *Harris* v. *Reed*, 489 U. S. 255, 265, n. 12 (1989)). The California Supreme Court would have to say that only the Fifth and Sixth Amendment claims were barred. Thus the decision below would require the California Supreme Court to work through the nearly 1,000 original habeas petitions it dismisses each year, find which ones contain procedural default claims, and list which claims are procedurally defaulted. When a court must list its reasons for summary denial, the denial takes on most of the characteristics and time requirements of an opinion. See *Darr*, *supra*, 339 U. S., at 227-228 (Frankfurter, J., dissenting). No court as busy as the California Supreme Court can stand up to such a workload.

Another effect of this opinion will be to increase the number of habeas petitions in the California Supreme Court. The Ninth Circuit's decision encourages a war of attrition between prisoners and the California judiciary. The California Court of Appeal had made an explicit finding of procedural default. Pet., Appendix C, at A-41. Yet when the California Supreme Court did not issue a finding of procedural default in defendant's successive petition, the statement by the Court of Appeal became void. Thus, under the Ninth Circuit's opinion, a prisoner who had lost a claim due to procedural default in an opinion of a California court would have an interest in filing as many habeas petitions as he can with the California Supreme Court. As soon as one summary denial came without any statement, all previous procedural default findings would be eradicated. This potential abuse can only add to the burdens on the California Supreme Court.

Given the great burdens this decision places on the California Supreme Court, it is unlikely that it will be able to comply with the Ninth Circuit's dictates. In addition to the practical problems with compliance, the California Supreme Court is not the body most interested in preserving a defendant's procedural default. The California Attorney General's

Office is the branch of California's government entrusted with preserving convictions. See Cal. Const. art. V, § 13. Therefore, that office, not the state Supreme Court, will be the agency most interested in preserving the finality of convictions by enforcing the procedural bar rule. The California Supreme Court is simply an impartial arbiter between defendant and the People. While a court has an interest in seeing its procedural rules obeyed, see, *e.g.*, *Davis* v. *United States*, 411 U. S. 233, 241 (1973), it is up to the Attorney General to protect these rules in federal court.

The decision below is based on dicta. In a footnote, the *Harris* Court addresses the threat of a "flood of improper prisoner petitions" in light of the court's decision. *Harris*, *supra*, 489 U. S., at 265, n. 12. The footnote stated that this problem could be avoided by "a one-line *pro forma* order" stating " 'relief is denied for reasons of procedural default.' " *Ibid.* The Ninth Circuit used this statement to fashion its holding. *Nunnemaker*, *supra*, 896 F. 2d, at 1204.

This footnote is obiter dicta. *Harris* did not involve a summary dismissal of a habeas petition. It dealt with a full written opinion. *Id.*, at 258. Footnote 12 dealt with an issue not presented in the case before the Court.

Chief Justice Marshall long ago cautioned against putting too much weight on dicta. "The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided but their possible bearing on other cases is seldom completely investigated." *Cohens* v. *Virginia*, 6 Wheat. (19 U. S.) 264, 399-400 (1821). As the *Harris* Court was not presented with the situation in the present case, it was not confronted with the ramifications of requiring state courts to comply with this "one-line" requirement. In using this dictum from *Harris*, the Ninth Circuit failed to appreciate the burdens this would place on the California Supreme Court. The dictum in *Harris* should not be used to bring about the effective abrogation of procedural bar in California.

California's inability to enforce its procedural rules will raise other problems. One reason to enforce procedural default is to discourage " 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." *Wainwright* v. *Sykes*, 433 U. S. 72, 89 (1977). The Ninth Circuit's decision in the present case runs the risk of encouraging this practice because of the ease with which procedural default can be overcome. The California Supreme Court only has to issue one summary denial of an original habeas petition without mentioning procedural default for California to be prevented from using procedural default in any federal habeas corpus action. If the California Supreme Court does not comply with the dictates of the Ninth Circuit, then sandbagging becomes even easier for defendants. The Ninth Circuit will refuse to enforce procedural default against California defendants and they will therefore be able to omit claims in state court without the risk of losing them. Thus the problem with *Fay* v. *Noia*, 372 U. S. 391 (1963) that this Court cured in *Sykes* will once again plague a state.

Once criminal defendants can bypass state courts this easily, other principles that procedural default protects are at risk. A state's comity interest in being able to litigate a claim first will be compromised if a criminal defendant can omit a claim in the state courts and subsequently raise it in federal courts through habeas corpus. See *Engle* v. *Isaac*, 456 U. S. 107, 128-129 (1982).

The finality of state convictions is similarly endangered. If a defendant can hold back a constitutional claim or two without the risk of losing them, then he can perpetuate his criminal proceeding beyond its natural course by holding back a few claims for habeas corpus in federal court. "Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult." *Davis*, *supra*, 411 U. S., at 241.

Harris v. *Reed*, 489 U. S. 255, 264 (1989) was decided with the understanding that the interests supported by procedural default such as federalism, comity, and finality would not be harmed. The Ninth Circuit, however, by blindly applying one piece of dicta from *Harris*, threatens these interests. If the procedural default doctrine is to retain any force by its centennial, cf. *In re Wood*, 140 U. S. 278 (1891), then the decision of the Ninth Circuit must be reversed.

II. Summary denial of discretionary jurisdiction is not "the last state court judgment" under *Harris* v. *Reed*.

In *Harris* v. *Reed*, 489 U. S. 255, 263 (1989), the Court held that "procedural default does not bar consideration of a federal claim on direct or habeas review unless the last state court rendering a judgment in the case ' "clearly and expressly " ' states that its judgment rests on a state procedural bar." The Ninth Circuit read this to include the California Supreme Court's summary denial of defendant's successive habeas petition. *Nunnemaker* v. *Ylst*, 896 F. 2d 1200, 1203 (9th Cir. 1990). This decision ignores the realities behind the California Supreme Court's decision to summarily deny an original habeas corpus petition. When the California Supreme Court summarily denied defendant's successive habeas petition without opinion, it simply exercised its discretion to decline to take a case. This is similar to this Court's summary denial of a certiorari petition or an original habeas corpus petition. Each has no meaning beyond the decision not to take a case. Thus a denial by the California Supreme Court is not meaningful enough to qualify as the "last state court judgment" under *Harris*.

Part of the Ninth Circuit's reasoning behind its holding was its belief that the California Supreme Court's original jurisdiction over defendant's habeas corpus action was not discretionary. See *Nunnemaker*, *supra*, 896 F. 2d, at 1203-1204, n. 4. This reasoning misunderstands the California Supreme Court's role in adjudicating habeas corpus petitions.

While the California Supreme Court, along with the courts of appeal, and superior courts has original jurisdiction in habeas proceedings, Cal. Const. art IV, § 10, the high court's jurisdiction is discretionary, not mandatory.

> "The work of the Supreme Court consists primarily of determining what cases the court will review and deciding those cases by written opinions after holding oral argument.
>
> "Appeals in all death penalty cases are automatically taken to the Supreme Court. Other cases normally come before the court either in the form of petitions for review of decisions by the Courts of Appeal or as petitions for extraordinary writs of mandate, prohibition, certiorari, *or habeas corpus. In these cases, the court must decide whether to accept the matter for decision*." Supreme Court of California, *Practices and Procedures* 13 (1990 rev.) (emphasis added).

A prisoner is expected to file his initial habeas petition in superior court, if he starts in appellate court, the appellate court is likely to dismiss the petition. See *In re Hillery*, 202 Cal. App. 2d 293, 294, 20 Cal. Rptr. 359 (1962). The process by which a habeas petition makes its way from the superior court to the California Supreme Court is discussed at length in the petition for certiorari in the present case. See Pet. 21-26. Briefly, when a prisoner's habeas petition is denied, he must file a successive petition in the next higher court. If the petition is denied by the Court of Appeal, the prisoner has the option by statute of either filing a successive petition in the Supreme Court or filing a petition for review. Cal. Pen. Code §§ 1475, 1506.[6] When the Court of Appeal has taken briefing

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6. A petition for review is analogous to a petition for certiorari in this Court and is granted or denied for similar reasons. Compare Cal. Rules of Court rule 29(a)(1) with Rules of the Supreme Court rule 10.1. The term "having"rather than "review" in section 1506 is a leftover from earlier law. See generally 9 B. Witkin, *California Procedure, Appeals* §§ 692, 693 (3d ed. 1985).

and argument and rendered an opinion, however, the California Supreme Court has disapproved the successive writ practice and required a petition for review. See *In re Michael E.*, 15 Cal. 3d 183, 193, n. 15, 538 P. 2d 231 (1975).

The *Michael E.* rule reinforces the discretionary nature of the habeas petition in the California Supreme Court. The California Supreme Court would not require a prisoner to take the discretionary route of appellate review in lieu of a course which would give him a decision on the merits as a matter of right. The conclusion necessarily follows that an original habeas petition is treated as a request for discretionary review.

The decision of the Ninth Circuit regarding the law of a state within its jurisdiction is entitled to respect. The views of a state's high court on state law, however, are dispositive. See *Wainwright* v. *Goode*, 464 U. S. 78, 84 (1983). As the California Supreme Court treats its *decision* as whether to consider an original habeas petition discretionary, this binds the federal courts.

This Court treats original habeas petitions in a similar manner. This Court shares original habeas jurisdiction with the district courts and circuit courts. 28 U. S. C. § 2241(a). This is discretionary jurisdiction. *Ex parte Abernathy*, 320 U. S. 219, 220 (1943) (per curiam). Given the demands placed on this Court's resources, it will consider an original habeas petition only under extraordinary circumstances. See *ibid.* "These writs are rarely granted." Supreme Court Rule 20.4(a). Summary denial is not a ruling on the merits. *Abernathy*, *supra*, 320 U. S., at 220.[7]

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7. Once a habeas petition has gone through the lower federal courts, it is subject to this Court's certiorari jurisdiction. See R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice*, § 11.3 at 510 (6th ed. 1986). Thus this Court rarely hears original habeas petitions. *Id.*, at 508.

A summary denial of a habeas petition by the California Supreme Court is also similar to this Court's denial of a petition for certiorari. In each instance, a jurisdiction's highest court decides not to decide a particular case. In each instance, the decision is usually announced without providing any reasons for the decision. Finally, in each instance, the decision has no precedential value beyond the fact that jurisdiction was not extended to that particular case. By considering this summary denial by the California Supreme Court to be "the last state court judgment" under *Harris* v. *Reed*, *supra*, the Ninth Circuit made something out of nothing.[8]

This Court has repeatedly stated that its denial of a petition for certiorari has no bearing on the merits of the case. See, *e.g.*, *United States* v. *Carver*, 260 U. S. 482, 490 (1923). This rule is not a matter of choice, it is necessary for this Court to function properly with its large docket. Reading any meaning into this Court's denial of certiorari would undermine this Court's control of its docket. The leading exponent of this position has been Justice Frankfurter. In a series of opinions, concurrences, and dissents, he has set out the reasons why no meaning can be read into a high court's summary refusal to accept a case.

In *Brown* v. *Allen*, 344 U. S. 443, 497 (1953), a majority of the Court held that a denial of certiorari has no bearing on subsequent habeas corpus proceedings in federal court.[9] This holding was based on this Court's treatment of a denial of certiorari. Certiorari jurisdiction was functional, and thus was treated in view of what it was intended to accomplish. *Id.*, at 491. Certiorari was designed to allow this Court to control its

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8. A somewhat different practice now prevails in capital cases, where the habeas petition is considered concurrently with the direct, automatic appeal. See Supreme Court Policies Regarding Cases Arising From Judgments of Death, 50 Cal.3d, Advance Sheets, Rules 1, May 22, 1990. As this is not a capital case, this variation need not be considered here.

9. Justice Frankfurter's opinion is the majority opinion on this point only. See *id.*, at 452.

docket, allowing it to keep to manageable proportions the number of cases it decided. *Ibid.* Therefore, decisions on whether to grant certiorari did not turn on whether a particular decision was correct, but on the importance of the issues involved. *Ibid.*; see also Supreme Court Rule 10.1.

This functional approach dictated the treatment of a denial of certiorari.

> "We have repeatedly indicated that a denial of certiorari means only that, for one reason or another which is seldom disclosed, and not infrequently for conflicting reasons which may have nothing to do with the merits and certainly may have nothing to do with any view of the merits taken by a majority of the Court, there were not four members of the Court who thought the case should be heard." *Brown, supra*, 344 U. S., at 492.

Thus a district judge should not discern hidden meanings from this Court's denial of certiorari. The lower court rarely knows what happened in the certiorari proceeding. *Ibid.* It usually has different records before it than this Court had. *Id.*, at 494-495. Even if the District Court had the same record it would not help it discern this Court's motives. See *id.*, at 495. "To say that he [the District Court judge] is at liberty to decide whether we passed on the merits of a case invites what must, in almost all cases, be idle speculation." *Ibid.*

Allowing district courts to read meaning into a denial of certiorari had too much potential for mischief. If district courts could deny a habeas petition simply because certiorari had been denied, then the scope of habeas corpus jurisdiction would be left to their unbounded discretion. *Ibid.* They would be deciding "on the most fragile foundations" which do no more than offer "a shelter for district judges to respond according to the individual will." Therefore, to prevent "judicial impressionism" a denial of certiorari could not be "interpreted as an 'expression of an opinion on the merits.' " *Id.*, at 497.

One reason why a denial of certiorari has no precedential value is that no reasons for denying certiorari are given by this

Court. See *id.*, at 492. The reasons for this practice were enunciated by Justice Frankfurter in an opinion with respect to a denial of certiorari in *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, 917-918 (1950).

> "The sole significance of such denial of a petition for writ of certiorari need not be elucidated to those versed in the Court's procedures. It simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter 'of sound judicial discretion.' Rule 38, paragraph 5. A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result. . . . Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening."

The denial of certiorari must have no meaning "unless the whole conception of certiorari in relation to the business of this Court is to be radically transformed." *Darr* v. *Burford*, 339 U. S. 200, 226 (1950) (Frankfurter, J., dissenting).[10] The heavy demands on this Court's resources require it to be able to dispose of the bulk of its docket with a minimum of effort. Having this Court give its reasons for denying each unsuccessful petition for certiorari would place too heavy a burden on its resources. "Divergent and contradictory reasons often operate as to the same petition and lead to a common vote for denial. The want of explanations for denials of certiorari is in part due to the fact that a collective reason frequently could not be given. *Id.*, at 227." Furthermore, if a denial is to have the effect of an opinion on the merits then it must be dealt with as an opinion on the merits. Turning each denial of certi-

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10. *Darr* was overruled on a related point in *Fay* v. *Noia*, 372 U. S. 391, 435-436 (1963).

orari into a miniature opinion would be impossible. *Id.*, at 228.

The damage that would be done by reading meaning into this Court's denial of certiorari is similar to the damage done in California by the Ninth Circuit's opinion. The California Supreme Court, like this Court, is confronted every year with a large docket of cases. Summary denial of a petition for habeas corpus is necessary for the California Supreme Court to keep control of its docket.[11] A habeas petition can be summarily denied for many reasons. It may fail on the merits, it may be successive, see Cal. Pen. Code § 1475, it may need to be raised in a lower court first, see *In re Hillery*, *supra*, 202 Cal. App. 2d, at 294, it may not raise issues worthy of the court's attention, or it could raise procedurally barred claims. See *In re Wells*, 67 Cal. 2d 873, 875, 434 P. 2d 613 (1967).

As a habeas corpus petition frequently will raise many claims and, as there could be different reasons for dismissing each claim, a summary dismissal of a habeas petition is likely to involve many different issues. Uniting the views of the justices on these disparate issues would at least equal the task of getting this Court to agree on its reasons for denying certiorari. Cf. *Darr*, *supra*, 339 U. S., at 227 (Frankfurter, J., dissenting).

The Ninth Circuit's decision to read meaning into the California Supreme Court's summary denial of defendant's successive habeas petition contradicts this Court's analysis of the effect of such denials. 28 U. S. C. § 1257 provides that this Court's review of state court judgments and decrees relates only to those judgments and decrees rendered "by the highest court of a state, in which a decision could be had." An issue that arises under this statute is which court to issue certiorari to when a state intermediate appellate court decides the case and the state high court declines to review the decision. This Court has consistently held that a denial of discretionary review is not the relevant decision under 28 U. S. C. § 1257. Thus in *American Railway Exp. Co.* v. *Levee*, 263 U. S. 19, 20-

11. See Part I. B., *supra*, at 7-14.

21 (1923), the Court found that when a state high court declined discretionary review of the decision of the state intermediate appellate court, the lower court's decision, not the denial of review, was the relevant decision for certiorari purposes. What counts is an actual decision of the case by a court, not a decision not to accept the case. See *Primoda* v. *McGaughtry*, 910 F.2d 1379, 1382-1383 (7th Cir. 1990) (criticizing the Ninth Circuit's opinion in the present case).

R. J. Reynolds Tobacco Co. v. *Durham County*, 479 U. S. 130 (1986) provides an informative contrast. North Carolina gives, with few exceptions, a litigant "an appeal of right to its Supreme Court from any decision of its Court of Appeals that 'directly involves a substantial question arising under the Constitution of the United States or of this State.' " *Id.*, at 138. The North Carolina Supreme Court had granted Durham County's motion to dismiss Reynolds' appeal from a decision of the North Carolina Court of Appeals for a lack of a substantial constitutional question. *Id.*, at 136. The issue in *R. J. Reynolds* was which decision was the last decision by a state court for the purposes of 28 U. S. C. § 1257: the decision of the Court of Appeals, or the dismissal of the appeal by the North Carolina Supreme Court. *Id.*, at 138.

The *Reynolds*' Court noted that there was no authority on the effect of such a dismissal. *Id.*, at 138, n. 6. Furthermore, the state rule required that a judgment about the merits of the question be made before the court could decide whether its jurisdiction was mandatory or discretionary. *Id.*, at 139. The California Supreme Court's decision to accept a habeas case is discretionary, however.[12] Thus the summary denial of a habeas petition is like the summary denial of review in *American Railway Exp. Co.*, *supra*, and would not be a judgment or decree under 28 U. S. C. § 1257.

A summary denial of a habeas petition stands for nothing more than the fact that the California Supreme Court did not

12. See part II., *supra*, at 15-16.

believe that the case warranted supreme court review. Cf. *Brown*, *supra*, 344 U. S., at 492; *Ex parte Tracy*, 249 U. S. 551-552. By reading additional meaning into the California Supreme Court's summary denial of defendant's successive habeas petition, the Ninth Circuit "transform[s] a mechanism for keeping cases out of [the California Supreme Court] into a means of bringing them in." *Darr*, *supra*, 339 U. S., at 227-228 (Frankfurter, J., dissenting). The California Supreme Court has sufficient work without having a federal court tell it to render mini-opinions on nearly a thousand habeas petitions every year.[13] The *Harris* Court recognized that state courts do not need extra burdens by limiting the decision to "the last state court rendering a *judgment* in the case . . . . " *Harris*, *supra*, 489 U. S., at 263 (emphasis added). The summary, unarticulated refusal of the California Supreme Court to further consider defendant's habeas petition cannot be such a judgment.

III. The summary denial by a court of an attempt to relitigate a previously litigated issue should not be considered an intervening "judgment" under *Harris* v. *Reed*.

While amicus submits that the California Supreme Court's decision to summarily deny a habeas corpus petition is an exercise of discretionary jurisdiction,[14] even if this action was more than a decision not to take a case, see *Nunnemaker* v. *Ylst*, 896 F. 2d 1200, 1203, n. 4 (9th Cir. 1990), it still should not be considered "the last state court rendering a judgment in the case . . . " under *Harris* v. *Reed*, 489 U. S. 255, 263 (1989). *Harris* is not a ritual that state courts must constantly invoke to appease federal courts. It is a common sense rule designed to solve the problem of ambiguous state court *decisions* with a minimum of discretion on the part of federal courts. By focusing on the result instead of the last decision by the California

13. See part I. B., *supra*, at 7-14.

14. See part II., *supra*, at 15-16.

judiciary, the Ninth Circuit turns *Harris* into an expensive ritual for state courts to heed.[15]

The *Harris* Court was confronted with an unclear decision of an Illinois appellate court. On Harris' petition for post conviction relief, the Appellate Court of Illinois had to deal with an ineffective assistance of counsel claim that had not been raised at his direct appeal.[16] *Id.*, at 257. The Appellate Court dealt with this in two ways. First it noted "the 'well-settled' principles of Illinois law that 'those [issues] which could have been presented [on direct appeal] but were not, are considered waived.' " *Id.*, at 258. It further found that with one exception Harris could have raised all of his ineffective assistance claims on appeal. *Ibid.* The problem was that the Appellate Court also rejected all of Harris' ineffective assistance claims on the merits. *Ibid.*

Federal courts had to decide whether Harris' ineffective assistance claims were procedurally barred when there was no clear answer from the Appellate Court. The *Harris* Court recognized that it needed to supply the answer. *Id.*, at 259-260. The answer came in the form of applying the "plain statement rule" of *Michigan* v. *Long*, 463 U. S. 1032, 1041 (1983) to the last decision of the state court. *Harris*, *supra*, 489 U. S., at 265.

Long, like *Harris*, reviewed a state court opinion that rested on both state and federal grounds. *Long*, *supra*, 463 U. S., at 1043. The court was dissatisfied with its previous independent state grounds decisions. Some required the court "to interpret state laws with which we are generally unfamiliar, and which often, as in this case, have not been discussed by the parties." *Id.*, at 1039. Its practice of vacation and continuance for clari-

15. See part I. B., *supra*, at 7-14.

16. Harris did not seek review in the Illinois Supreme Court of the Appellate Court's decision. Thus the last decision of any kind in *Harris* before federal habeas was the decision of the Appellate Court. See *id.*, at 258.

fication, see *e.g.*, *Herb* v. *Pitcairn*, 324 U. S. 117 (1945), was also unsatisfactory as it placed too great a burden of compliance on the state courts. *Long*, *supra*, 463 U. S., at 1040-1041.

The *Long* Court solved this problem by presuming that a state court decision relied on federal law "when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Id.*, at 1039-1040. The *Long* Court did not abandon independent state grounds. It simply avoided having this Court decipher ambiguous state court opinions. *Id.*, at 1041. It accomplished this by raising a presumption of federal grounds. *Id.*, at 1042.

The problem faced in *Harris* and *Long* is not the problem in the present case. In *Harris* no state court made a clear finding of procedural default. See *Harris*, *supra*, 489 U. S., at 257-258. The present case, however, has seen the litigation of the procedural default issue by the California judiciary. The California Court of Appeal provided a clear, uncontradicted statement of procedural default. "Although the record is silent as to whether defendant was timely advised of such rights [under *Miranda*], the failure to interpose an objection during trial precludes our consideration on appeal." Pet., Appendix C, at A-41.

The fact that the California Supreme Court made no statement in its last summary denial of defendant's attempt to relitigate this issue adds no uncertainty to the California Court of Appeal's finding of procedural default. The problem in *Harris* was that no clear statement of procedural default existed. Here, there is such a statement. Applying the *Harris* rule to the non-statement of the California Supreme Court, when a clear statement of procedural default had already been made earlier in the litigation, creates uncertainty where none exists. *Harris*, like *Long*, is intended to keep federal courts from deciphering state court opinions, not to conjure something out of nothing. See *Long*, *supra*, 463 U. S., at 1041; *Harris*, *supra*, 489 U. S., at 264-265.

This is underscored by this Court's treatment of an analogous situation under *Long*. In *Michigan* v. *Chesternut*, 486

U. S. 567, 570-572 (1988), a state appellate court rendered a decision which the state high court declined to review. The *Chesternut* Court looked to the decision of the Michigan Court of Appeals to determine whether independent state constitutional grounds existed to uphold the result. *Id.*, at 571, n. 3. The fact that the Michigan Supreme Court declined to review the appellate court's decision had no bearing on this Court's analysis of the *Long* issue. The *Chesternut* Court could have treated the Michigan Supreme Court's summary denial of petitioner's leave to appeal in the same manner that the Ninth Circuit treated the California Supreme Court's summary denial of a habeas petition. It could have taken the order of the Michigan Supreme Court to be the relevant decision under *Long*, and, finding no express statement of independent state grounds in the summary denial, proceeded to deal with the merits of the case. Instead, the *Chesternut* Court looked to the last *opinion* of a Michigan court.

Long was developed to help this Court determine "whether various forms of references to state law constitute adequate and independent state grounds . . . . " *Long*, *supra*, 463 U. S., at 1038. The *Chesternut* Court applied the underlying premise of *Long* that it was meant to interpret the last relevant opinion of a state court. *Chesternut*, *supra*, 486 U. S., at 571, n. 3. The *Harris* Court found itself faced with the same problem as the *Long* Court. *Harris*, *supra*, 489 U. S., at 262-263. Faced with a common problem, it adopted a common solution. *Id.*, at 263. But this case presents the same problem as *Chesternut*. Therefore, as in *Chesternut*, a court analyzing a *Harris* issue should look to the last opinion on the procedural default issue.[17]

Harris was not intended to change the administration of procedural default. See *Harris*, *supra*, 489 U. S., at 264. It was meant to prevent federal courts from having to undergo the

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17. A different situation is presented when a summary dismissal is the first court action which follows the default. That question is not presented here, but is presented in *Coleman* v. *Thompson*, No. 89-7662. Amicus intends to discuss this issue further in that case.

time consuming task of interpreting ambiguous state court statements regarding procedural default. See *id.*, at 264-265. Here, no such ambiguity existed. There was a clear finding of procedural default, uncontradicted by any future litigation. Explicit adoption of the approach which was implicit in *Chesternut* will restore much needed order to procedural default.

The correct rule, amicus submits, is this. When a state court has made a plain statement satisfying *Harris* v. *Reed*, subsequent summary dispositions are not intervening "judgments" within the meaning of *Harris* unless they decide the procedurally defaulted issue on the merits without reaffirming the previous finding of procedural default.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals should be reversed.

Dated: December, 1990

Respectfully submitted,

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NO. 90-68

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

EDDIE S. YLST, WARDEN,

Petitioner,

-vs-

OWEN DUANE NUNNEMAKER,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF ARIZONA, ALASKA, CONNECTICUT, FLORIDA, IDAHO, MISSOURI, MONTANA, NEVADA, NEW JERSEY, NORTH CAROLINA, PENNSYLVANIA, UTAH, VIRGINIA AND WASHINGTON IN SUPPORT OF PETITIONER, AMICI CURIAE

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Questions Presented

Has the United States Court of Appeals for the Ninth Circuit misconstrued and missapplied the "plain statement" rule adopted by this Court in Harris v. Reed?

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INTRODUCTION

In the decision below, the United States Court of Appeals for the Ninth Circuit reversed the district court's finding that respondent's Fifth and Sixth Amendment challenges to the prosecution's psychiatric testimony was procedurally barred because the California Supreme Court, in summarily denying respondent's second "original" state petition for writ of habeas corpus, did not "clearly and expressly" state that it was doing so in reliance upon respondent's "procedural default." Nunnemaker v. Ylst, 904 F.2d 473, 476 (9th Cir. 1990). The "procedural default" averred to by the Ninth Circuit was the express finding of the California Court of Appeal, on direct appeal, that the claims were precluded due to respondent's failure to object at trial and the California Supreme Court's denial to review the direct appeal. See Nunnemaker v. Ylst, 904 F.2d at 474.

The Ninth Circuit's decision evidences a profound misunderstanding of this Court's holding in Harris v. Reed, 489 U.S. 255, 109 S. Ct. 1038 (1989), and state court procedural default in general. Further, the decision flies in the face of the principles of federalism and comity underlying the exhaustion and procedural default doctrines. Finally, if permitted to stand, the Ninth Circuit's decision will encourage state prisoners to frustrate and circumvent established state court procedures in presenting their federal constitutional claims to the state courts and will result in a concomitant avalanche of heretofore unexhausted or procedurally barred claims upon the already overburdened United States District Courts.

Accordingly, amici urge this court to seize the opportunity to clearly articulate application of the "plain statement" rule in the context of state court procedural defaults.

ARGUMENT

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS MISCONSTRUED THIS COURT'S HOLDING IN HARRIS v. REED.

A. The "plain statement" rule adopted by this Court in Harris v. Reed, applies only when the state prisoner has fairly presented a claim to the state courts in a procedurally appropriate manner, resulting in an ambiguous ruling by the last state court rendering judgment and providing reasons for the judgment.

In Harris v. Reed this Court held that, when the last state court rendering judgment on a particular claim makes mention of a procedural bar (i.e. waiver, preclusion) but alternatively addresses the merits of the federal claim, there is no procedural bar to a federal court's subsequent consideration of the claim in a habeas corpus proceeding unless the state court clearly expresses its reliance upon the procedural bar as an independent basis for its ruling. 489 U.S. at ___, 109 S. Ct. at 1043-44. The Ninth Circuit, however, reads Harris v. Reed, to hold that

federal courts are to wear blinders in determining whether a particular claim is procedurally barred, looking only to the last state court order addressed to the claim. This is clearly not what this Court intended.

In determining whether federal constitutional claims have been exhausted in state court, federal courts must necessarily look to the appellate and post-conviction procedures available and utilized in state court. See Teague v. Lane, 489 U.S. ___, ___, 109 S. Ct. 1060, 1067-68 (1989); Castille v. Peoples, 489 U.S. 346, ___, 109 S. Ct. 1056, 1058-60 (1989). In Castille v. Peoples, decided the same day as Harris v. Reed, the state prisoner filed a post-appeal "petition for allocatur" raising certain federal constitutional claims. 489 U.S. at ___, 109 S. Ct. at 1058. This Court noted that, under Pennsylvania law, "allocatur" review "is not a matter of right, but of sound

judicial discretion." Id. The Court held that the Pennsylvania Supreme Court's denial of the petition without comment was not an on-the-merits denial of the claims because the state prisoner had not "fairly presented" the claims to the state's highest court in a procedurally appropriate manner. 489 U.S. at ___, 109 S. Ct. at 1060. Accordingly, the Court reversed the circuit court of appeals' decision that had found the claims properly exhausted, stating, for purposes of remand, that "[t]he requisite exhaustion may nonetheless exist, of course, if it is clear that respondent's claims are now procedurally barred under Pennsylvania law." 489 U.S. at ___, 109 S. Ct. at 1060, citing Engle v. Isaac, 456 U.S. 107, 125-26 n.28 (1982); Teague v. Lane, 489 U.S. 288, ___, 109 S. Ct. 1060, 1068 (1989).

Thus, as a prerequisite to application of the "plain statement" rule, the federal court must determine that the claim was

fairly presented to the state courts in a procedurally appropriate manner. A state prisoner is not free to pick and choose which procedural vehicle he wishes to utilize in presenting his federal constitutional claims to the state's highest court -- he must utilize those procedures mandated by state law. See Castille v. Peoples, 489 U.S. at ___, 109 S. Ct. at 1059-60. If a state prisoner has utilized an inappropriate procedural vehicle in attempting to present the claim to the state courts, an order denying the claim -- even if issued by the state's highest court -- will not be construed as an on-the-merits denial. Castille v. Peoples, 489 U.S. at ___, 109 S. Ct. at 1060. Raising the claim in such a fashion is simply not a "fair presentation" of the claim, and the federal courts should not presume that state courts refuse to follow their own procedural rules unless the state court expressly so states. See Castille v.

Peoples, 489 U.S. at ___, 109 S. Ct. at 1060. Principles of federalism and comity demand no less.

In the present case, the Ninth Circuit held that the filing of an "original" petition for writ of habeas corpus in the California Supreme Court was a procedurally appropriate manner of presenting federal constitutional claims to the state supreme court under California law.[1] See Nunnemaker v. Ylst, 904 F.2d at 476 n.4.

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1. A state "petition for writ of habeas corpus" might not be a procedurally appropriate manner of presenting federal constitutional claims to the state's highest court in other states. For example, in Arizona, a state prisoner may seek review of federal constitutional claims only by way of direct appeal or petition for post-conviction relief. See Rules 31, 32, Ariz. R. Crim. P.; State v. Sandon, 161 Ariz. 157, 158, 777 P.2d 220, 221 (1989). Under Arizona law, the scope of state habeas corpus is limited to challenging the jurisdiction of the trial court. See State v. Montez, 102 Ariz. 444, 447, 432 P.2d 456, 459 (1967); State v. Morales, 90 Ariz. 11, 12, 363 P.2d 606, 606 (1961).

Petitioner takes issue with this finding, at least when a particular claim has previously been found to be procedurally barred. (See Petition for Writ of Certiorari at 31-34.) The briefing of this state law issue is best left to petitioner. Amici find most troublesome the Ninth Circuit's fixation upon the last state court "order" in applying the "plain statement" rule of Harris v. Reed. As previously noted, such a narrow view of state court procedures is not mandated by this Court's decision in Harris v. Reed and is contrary to the Court's express holding in Castille v. Peoples.

In adopting the "plain statement" rule previously enunciated in Michigan v. Long, 463 U.S. 1032 (1983), this Court made it clear that it was doing so to "avoid the difficulties associated with" ambiguities in state court decisions. Harris v. Reed, 489 U.S. at ___, 109 S. Ct. at 1042. In the decision below, the Ninth Circuit has

contorted the "plain statement" rule to create an ambiguity where none existed. The Fourth, Fifth, and Eleventh Circuits have been presented with a similar procedural scenario, but through exertion of intellectual vigor woefully lacking in the Ninth Circuit's decision, reached contrary and proper results. See Felton v. Barnett, 912 F.2d 92, 94-96 (4th Cir. 1990); Harmon v. Barton, 894 F.2d 1268, 1271-74 (11th Cir. 1990); Russell v. Lynaugh, 892 F.2d 1205, 1210-11 (5th Cir. 1989).

In Felton v. Barnett, the state prisoner, in his fifteenth state motion collaterally attacking his conviction, for the first time raised a claim of racial discrimination in the selection of the foreperson of the grand jury that indicted him. 912 F.2d at 93. The superior court denied the motion, finding the claim barred due to the state prisoner's failure

to raise this claim in his prior state court actions. Id. at 93-94.

The North Carolina Supreme Court denied the state prisoner's petition for writ of certiorari, stating:

> Upon consideration of the petition filed by Defendant in this matter for a writ of certiorari to review the Superior Court, Durham County, the following order was entered and is hereby certified to the Superior Court of that county:
>
> Denied by order of the Court in conference, this 30th day of June 1988.

Id. at 94. In finding the state prisoner's claim procedurally barred for purposes of federal habeas corpus review, the Fourth Circuit held that the North Carolina Supreme Court's denial of certiorari was not "the last state court judgment in the case" because it merely refused to hear the state prisoner's appeal from the superior court's denial of the motion on procedural grounds. Id. The Fourth Circuit did not fixate upon the last state court "order," but noted

that, under North Carolina law and procedure, it was clear that the superior court's denial of the state prisoner's motion was the relevant "judgment," and that it "clearly and expressly" rested upon a state procedural bar. Id. at 95.

In Russell v. Lynaugh, the Texas Court of Criminal Appeals, on direct appeal, ruled that the state prisoner had waived his Witherspoon[2] claim, in relation to the excusal of three particular veniremen, by his failure to raise appropriate objections at trial. 892 F.2d at 1209. The state prisoner subsequently filed a state petition for writ of habeas corpus in the trial court, raising a Witherspoon claim in relation to the excusal of a fourth venireman. Id. The trial court, citing the court of appeals' previous decision, denied the

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2. Witherspoon v. Illinois, 391 U.S. 510 (1968).

petition, and the state prisoner appealed to the court of appeals which in an unwritten order denied the writ. Id. In light of this procedural posture, the Fifth Circuit applied the "plain statement" rule of Harris v. Reed. The court first noted that it was "absolutely clear" that the Texas Court of Criminal Appeals had applied a state procedural bar in rejecting the state prisoner's Witherspoon claims on direct appeal. Id. at 1210. The court next stated that there was "no reason for distinguishing" the claim raised on appeal from that raised in the state petition for writ of habeas corpus, since the Witherspoon issue was identical. Id. Finally, the Fifth Circuit rejected the state prisoner's argument that the "last state court rendering judgment" did not "clearly and expressly" apply a procedural bar when the Texas Court of

Criminal Appeals denied the petition for writ of habeas corpus in an unwritten order:

> [T]he simple denial of the petitioner's rerun of identical claims on habeas [is no] basis to ignore the clear and express rulings of the Texas appellate court. Indeed, we unhesitatingly read this disposition of the habeas claims as a clear and express reliance upon the earlier, fully articulated rulings applying the procedural bar to all Witherspoon claims. Moreover, when we apply the literal words of Harris, we can only conclude that, true to the command of these words, "the last state court rendering a judgment in the case," that is the Texas Court of Criminal Appeals, "clearly and expressly stated that judgment rests upon a state procedural bar," Harris, 109 S.Ct. at 1043, when it ruled on the Witherspoon issue. The "plain statement" rule does not require that the state court regurgitate the words of its earlier clear and express rulings every time identical issues are resubmitted to that court in the same case. All that is required is that "the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case," Caldwell v. Mississippi, 472 U.S. 320, 327, 105 S.Ct. 2633, 2638, 86 L.Ed.2d 231 (1985), and here actual reliance was expressed on three occasions in the state

> court's last opinion on the subject. Consequently it could not be plainer to us.

Id. at 1210-11 (emphasis added). The Fifth Circuit went on to note that a refusal to recognize a state court procedural bar would amount to a slap in the face to the long recognized and respected principles of federalism and comity, governing federal-state relations:

> Respect for the independence of state courts has been one of the primary cornerstones for the refusal of federal courts to decide cases where there is an adequate and independent state ground. Michigan v. Long, 103 S.Ct. at 3476. We do not know how the Texas Court of Criminal Appeals could have been clearer in asserting an independent state ground as a basis for rejecting the Witherspoon claims in this case. To ignore this emphatically stated basis for the state court's rulings, stated on three occasions in its opinion, would certainly exhibit disrespect for the judgment of the state court, and its right, as an independent judiciary, to apply its own constitutionally proper laws in deciding its own cases.

Id. at 1211 (emphasis added).

In Harmon v. Barton, the Florida trial court dismissed the state prisoner's second state motion for post-conviction relief, finding that the claim that his guilty plea was involuntary was procedurally barred because he had failed to raise the claim on direct appeal or in his prior post-conviction relief motion. 894 F.2d at 1269. The state appellate court, without comment, affirmed the trial court's denial of post-conviction relief. Id. at 1269-70. In denying the state prisoner's petition for writ of habeas corpus, the district court found the claim procedurally barred due to the state prisoner's failure to raise the claim on direct appeal. Id. at 1270. Observing the time honored principles of federalism and comity, the Eleventh Circuit looked to applicable state court appellate and post-conviction relief procedures, noting that, under Florida law, a motion for post-conviction relief

cannot be utilized to raise issues that were either raised or could have been raised on direct appeal and that issues not raised in a motion for post-conviction relief were procedurally barred in a second motion. Id. at 1270-71. The court also noted that, under Florida law, an unwritten per curiam affirmance of a trial court's denial of post-conviction relief on the ground of procedural default was an affirmance of "not only the judgment but the reasoning of the trial court." Id. at 1272-73. The Eleventh Circuit aptly stated:

> The "plain statement" rule, it should be emphasized, applies only when an ambiguity exists in the state court disposition. A per curiam affirmance decision does not create ambiguity to an otherwise unambiguous situation, just as it does not clarify ambiguity that exists based on the decision below. Stated differently, the plain statement rule should not be applied to create an ambiguity where one did not exist simply because the appellate court, by its per curiam

> affirmance, elected not to restate an unambiguous lower court ruling. We conclude that the court's per curiam affirmance of the trial court's ruling explicitly based on procedural default is a clear and express statement of its reliance on an independent and adequate state ground which bars consideration by the federal courts.

Id., 894 F.2d at 1273 (emphasis added; citation and quotation omitted). The court refused to take an untenable and narrow view of the "last state court order," stating:

> Unlike the state appellate court in Harris and other cases involving the Long plain statement, the state appellate court in this case did not issue a written opinion in which it made an ambiguous reference to state procedural bar while relying on federal law for its decision. The court's per curiam affirmance without comment of the lower court's ruling which expressly relied on procedural default does not require this court to speculate on what basis the state court denied petitioner's claim. The rationale behind the Court's decision in Harris - which is to relieve federal courts "from having to determine whether in a given case, consistent with state law, the state court has chosen to forgive a procedural default" - is

> equally applicable here. 109 S.Ct. at 1044 n.11. Under these circumstances, the policy considerations discussed in Harris are not compromised by applying the plain statement rule to the last state court that rendered judgment and provided reasons for the judgment.

Id. (emphasis added; footnote omitted).

In its decision below, the Ninth Circuit stated that its narrow view of the "last state court order" was effectively mandated by footnote 12 of this Court's decision in Harris v. Reed. Nunnemaker v. Ylst, 904 F.2d at 476. The Eleventh Circuit, however, noted that this Court did not intend such an untenable reading:

> We believe that the advice in Harris to state courts on stating their reliance on procedural grounds in form orders, 109 S.Ct. at 1044 n.12, was addressed to this situation where the lower court simply denies the habeas petition without comment.

Harmon v. Barton, 894 F.2d at 1274 (emphasis added). Any other reading would amount to an arrogant dictation of

how states must tailor their state court procedures to suit the whims of federal courts on collateral review -- a result never envisioned in the jurisprudence of this Court. See e.g. Castille v. Peoples, 489 U.S. at ___, 109 S. Ct. at 1059; Engle v. Issac, 456 U.S. 107, 128-29 (1982); Rose v. Lundy, 455 U.S. 509, 515-19 (1982). Further, it cannot be expected that state courts are aware of the intricacies of federal habeas corpus review -- they simply follow their established procedural rules. In looking over the shoulders of the state courts on collateral review, it is the duty of the federal judiciary, in observance of the principles of federalism and comity, to defer to the state's procedural rules and not to presume that the state courts have not followed their own rules unless the state court has expressly so stated.

Therefore, a reasoned interpretation of Harris v. Reed, as well as the remainder of this Court's habeas corpus jurisprudence, leads to the rational conclusion that the "plain statement" rule applies only when the state prisoner has fairly presented his claim to the state courts in a procedurally appropriate manner and the ruling of the last state court providing reasons for its judgment is ambiguous on whether the state court invoked a procedural bar as an independent basis for its judgment. By fixating upon the last state court "order," and refusing to consider the procedural posture of the state court proceeding, the Ninth Circuit clearly erred in applying the "plain statement" rule to lift a previously imposed state court procedural bar and to create an "ambiguity" where none existed. The decision of the Ninth Circuit must be reversed.

B. When a state court has applied a procedural bar, a subsequent state court ruling denying the claim does not vitiate the procedural bar unless the state court expressly so states.

Perhaps the most disturbing aspect of the lower court's decision is its unreasoned conclusion that the summary denial of the respondent's second "original" state petition for writ of habeas corpus somehow vitiated the express procedural bar applied nearly 10 years prior. As previously noted, when a state court applies a procedural bar, subsequent state court rulings denying the claim do not operate to lift, or vitiate, the procedural bar. Felton v. Barnett, 912 F.2d at 94-96; Harmon v. Barton, 894 F.2d at 1273-74; Russell v. Lynaugh, 892 F.2d at 1210-11. It simply makes no sense to encourage state prisoners to continuously paper the state courts with repetitive petitions or motions in the hope that a state court

will simply "deny" the pleading without using the magic words "for reasons of procedural default." Clearly, this Court did not intend such a bizarre and unreasoned result. Again, the "plain statement" rule was adopted to avoid or resolve ambiguities associated with state court decisions -- not to create them. See Harris v. Reed, 489 U.S. at ___, 109 S. Ct. at 1042. Indeed, amici submit that the "plain statement" rule should be applied in favor of the continued existence of a previously imposed procedural bar unless a state court, in a subsequent decision, "clearly and expressly" lifts the bar and does not rely upon the bar as an independent basis for its ruling. Such a rule would bode well for federal-state relations and is a logical application of Harris v. Reed to avoid creating ambiguities in state court decisions.

The court below clearly erred in holding that the "plain statement" rule of Harris v. Reed mandated that the 10-year-old procedural bar previously imposed was vitiated by the California Supreme Court's mere denial of a state petition for writ of habeas corpus that included the barred claim. In so holding, the Ninth Circuit arrogantly presumed that the California Supreme Court failed to follow its own procedural rules, and exhibited a total disregard for the principles of federalism and comity underlying the exhaustion and procedural default doctrines. The decision must be reversed.

CONCLUSION

The United States Court of Appeals for the Ninth Circuit has misconstrued this Court's holding in Harris v. Reed in a way that will encourage state prisoners to frustrate and circumvent state court procedures and wreak havoc upon the

already over burdened United States District Courts. This Court should seize the opportunity to clearly articulate application of the "plain statement" rule in the context of state court procedural defaults. In so doing, the Court must necessarily reverse that portion of the Ninth Circuit's decision remanding the case to the district court for consideration of the merits of respondent's Fifth and Sixth Amendment claims.

Respectfully submitted,

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